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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79- .....

FRANK R. WEST,
Petitioner,

VERSUS

BOB BERGLAND, SECRETARY OF THE DEPARTMENT OF AGRICULTURE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

Petitioner, Frank R. West, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit entered in this proceeding on December 19, 1979. The opinion decides a very important question of federal law which the Court of Appeals itself stated "presents a question of first impression" and which the Court of Appeals agreed is "not easily rejected." The question clearly warrants plenary review by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *West v. Bergland,* 611 F.2d 710 (8th Cir. 1979), and the unreported opinion of the District Court, appear as Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1979. A timely petition for rehearing, and suggestion of rehearing en banc, was denied on January 14, 1980 (App. D, p. 1), and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture has the implied power to sanction a private citizen by withdrawing from him — for an indefinite period — the meat grading and inspection services which the Secretary is commanded by the Agricultural Marketing Act of 1946 to make available to the public because of alleged "misconduct" by the individual, in the absence of any express statutory authority to impose such a sanction?

2. Whether an administrative proceeding seeking to impose a withdrawal of meat grading services initiated solely under §203 of the Agricultural Marketing Act of 1946 (7 U.S.C. §1622(h)) can be justified in court by *post hoc* reliance on §205 of the Agricultural Marketing Act, 7 U.S.C. §1624(b) when §205 was *not* relied upon by the Secretary prior to the institution of litigation challenging his authority under §*203*?

STATUTES AND REGULATIONS INVOLVED

The full text of the Agricultural Marketing Act of 1946, 7 U.S.C. §§ 1621-1630, is set forth as Appendix "B" to this Petition.

The critical provision is subsection (h) of section 203, 7 U.S.C. §1622(h). It reads, in pertinent part:

> "The Secretary of Agriculture is directed and authorized . . . to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products under such rules and regulations as the Secretary of Agriculture may prescribe, . . . to the end that agricultural products may be marketed to the best advantage . . . except that no person shall be required to use this service . . . Whoever knowingly shall [violate any provision of this subsection] shall be fined not more than $1,000 or imprisoned not more than one year or both."

The full text of 7 C.F.R. 52.13(a) [newly redesignated as 7 C.F.R. §2853.11(a)] is set forth in full as Appendix "C" to this Petition.

In relevant part it provides: *"Denal or Withdrawal of Service.* (a) *For misconduct* — (1) *Bases for denial or withdrawal."* The regulation then goes on to enumerate a multitude of categories of "misconduct" which are the "bases" for denial or withdrawal of the meat grading and inspection services Congress established, and adds a "catch-all" clause providing for denial or withdrawal when the Secretary of Agriculture believes a person "has in any manner not specified in this paragraph violated subsection 203(h) of the Act." All of the categories of "misconduct"

would be subject to the express judicial punishment Congress wrote into the subsection. Petitioner, Frank R. West, is a user of the meat grading and acceptance service whom the Secretary proposed to "sanction" by withdrawal of services for alleged "misconduct."

STATEMENT

In 1946 Congress passed the Agricultural Marketing Act. The Act is essentially a voluntary program designed to facilitate cooperation in research and development of agricultural products, to fund research, study and experimentation in agriculture and to improve the diet of Americans. The Congressional declaration of purpose shows, and the legislative history of the Act confirms, the view that Congress' only concern in enacting the statute was a qualm sounding in federalism: Congress wished to assist agricultural research without interfering with State and local functions having the same purpose. *See, Report of the* [*Senate*] *Committee on Agriculture and Forestry,* No. S.1843 (July 26, 1946) *reprinted in,* 1946 U.S. *Code Cong. Service,* p. 1584 *et seq.* (1946). Section 203(h) of the Act, 7 U.S.C. §1622(h) provides, as part of a litany of other directions to the Secretary of Agriculture, that the Secretary shall establish a service for grading, inspection and certification of agricultural products which are shipped in interstate commerce. This is the principal statutory genesis of the familiar symbol "U.S.D.A.", followed by a specific "grade" of beef. This section contains a specific penalty provision. If anyone knowingly violates the statute by forging or altering a mark or grade, by false statements, or otherwise, he shall

be imprisoned for a maximum period of one year and fined a maximum amount of $1,000, or both, for each offense.

While Congress has, thus, chosen the judicial sanction of fine and imprisonment if a United States District Court and jury determines there has been a violation of its statute, the Secretary contends that he has the implied power to impose the *additional* administrative sanction of withdrawal of meat grading or acceptance services, for an *unlimited* period of time, and wholly *uncontrolled* by any statutory criteria (since there are none), if he determines there has been a violation of §203(h). The Secretary claims that he has such power though Congress has not expressly granted such power to him, and though the Senate Floor Manager for the Agricultural Marketing Act emphatically assured the Senate that the Bill did not "in any way extend the power of the Department of Agriculture" and was "strictly a research Bill." 92 Cong. Rec., part 8, 79th Cong. 2d Sess., p. 10,370 (July 29, 1946); (Sen. Russell).

The Secretary's regulations for withdrawal of services are lengthy, detailed, and possess the tone of a penal act. 7 C.F.R. §53.13(a). The tone is understandable since the regulation expressly states its sanction is invoked for alleged "misconduct" by a private citizen.[1] This, Petitioner contends, has been done in defiance of the Act, not in conformity with it. Indeed, in 1955 Congress expressly *refused* to enact an amendment to the Act which would have given

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[1] 7 C.F.R. §53.13(a) was redesignated during the pendency of this litigation and now appears as 7 C.F.R. §2853.11(a). For the sake of clarity, we shall continue to refer to the regulation as it existed at the time this litigation was initiated.

the Secretary the power to promulgate "substantive" regulations and would have made violation of such regulations a crime. The proposed amendment to the Act was introduced by Senator Lyndon B. Johnson as S. 1757 (June 17, 1955). It would have "cover[ed] violations of regulations . . . [of the Secretary]." 101 Cong. Rec., part 7, 84th Cong., 1st Sess., pp. 8631-8632 (June 17, 1955) (Sen. Johnston).

The House of Representatives *emphatically* rejected the proposed amendment. See H. Rep. No. 1463, *Report of the Committee on Agriculture* (July 27, 1955) *reprinted in* 1955 *U.S. Code Cong. and Adm. News*, pp. 2727, *et seq.*

The Senate yielded to the House position to, *inter alia*, *"strike the provisions of* the *Bill imposing penalties for violations of regulations of the Secretary. . . ."* 101 Cong. Rec., part 10, pp. 12577-12578, 84th Cong., 1st Sess. (August 17, 1955) (Senator Ellender). (emphasis added)

Petitioner is a resident of Omaha, Nebraska. He is engaged in the business of buying and selling beef and pork individually and through direct and indirect ownership interests in companies conducting such operations. From 1965 until January of 1976, Mr. West was President and Chairman of the Board of American Beef Packers, Inc. ("ABP"). ABP was, at that time, the second largest beef packing house, and 216th largest corporation, in the United States.

In 1976, ABP sought reorganization under Chapter XI of the Bankruptcy Act. Mr. West continued to remain a contractual advisor to ABP pursuant to a contract approved by the reorganization court.

In January 1977, Mr. West pled guilty to a misdemeanor information filed in the District Court for the District of Nebraska. At the hearing on the misdemeanor information, Mr. West stated that during his tenure as President and Chairman of ABP, employees of ABP had given gratuities to federal meat inspectors; that he was aware of the practice; and that he did not attempt to end it. The District Court accepted the misdemeanor plea and fined Mr. West the sum of $1,000.

Some seven (7) months later, an administrative officer bearing the title of Administrator of the Food, Safety and Quality Service of the Department of Agriculture filed an instrument which he designated a "complaint" against Mr. West before an administrative law judge of the Department of Agriculture. This instrument states that the Administrator proposed to withdraw beef grading and acceptance services from Mr. West for an unlimited period of time, which could, presumably, be the rest of Mr. West's life, unless Mr. West could prove to the satisfaction of the Administrator that Mr. West should be allowed to participate in the use of the meat grading and acceptance services which the Secretary is commanded by §203 of the Agricultural Marketing Act to make available, on a voluntary basis. The administrative complaint stated that it was brought solely "pursunt to §203(h) of the [Agricultural Marketing] Act, 7 U.S.C. §1622(h))." It states that the reason for its filing is the plea of guilty which Mr. West entered to the misdemeanor information filed in the District Court for the District of Nebraska in January, 1977.

Mr. West would be allowed a hearing before sanctions are imposed for alleged "misconduct." Since no statute au-

thorizes the hearing, it is, presumably, a matter of administrative grace.[2]

There is no duration on the length of the "sanction" of withdrawal of services which may be imposed, nor are there any statutory criteria specifying the nature of the proof nor the nature of the defenses which may be asserted. This is so for the simple reason that Congress did not provide in the statute for any administrative sanctions and, naturally, did not specify criteria for a power it did not expressly grant. *Compare, e.g.*, the detailed provisions for withdrawal of services under the Perishable Commodities Act, 7 U.S.C. §499 *et seq.*

Petitioner initiated this suit in the District Court for the District of Nebraska contending that 7 C.F.R. §53.13(a) was void because it was both unauthorized by, and contrary to, the statute under which it purported to be issued, §203(h) of the Agricultural Marketing Act, 7 U.S.C. §1622 (h). Petitioner's showing that an administrative sanctioning hearing was imminent was uncontradicted.

After initially granting temporary restraining relief (continued by agreement), the district court held for the Respondents in a brief memorandum opinion.

On Petitioner's appeal, the Court of Appeals, although conceding that the question presented was one of "first im-

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[2] The Court of Appeals assumed that "sanctions" for alleged "misconduct" would be imposed only after a hearing of some sort. It expressly declined to intimate any opinion on the question of whether such "sanctions" could be imposed without a hearing, although it noted the Secretary purported to claim such power. *West* v. *Bergland*, 611 F.2d 710 722 n.16 (8th Cir. 1979).

pression" and that Petitioner's contention that 7 C.F.R. §53.13(a) was void was "not easily rejected", nevertheless, affirmed the district court's denial of injunctive relief for reasons substantially different from those advanced by the district court. Judge Ross, specially concurring, argued that the challenged regulation should, at least, contain criteria as to the length of time that the penalties which it imposed must be endured. *West* v. *Bergland, supra,* 611 F.2d at 725-726.

The Court of Appeals relied in substantial part upon §*205* of the Act (7 U.S.C. §1624(b)), in upholding the implied power of the Secretary to impose "misconduct sanctions" under §*203* (7 U.S.C. §1622(h)).

The court rejected as "speculative" Petitioner's contention that the legislative history of the Agricultural Marketing Act, and particularly the statements made by its Senate Floor Manager, Senator Richard B. Russell, clearly ..egated the grant of an implied sanctioning power such as the Secretary is here claiming.

Despite the penal tone of the regulation, and the flat statement of the Secretary that such sanctions are imposed only "for misconduct", 7 C.F.R. §53.13(a), the Court of Appeals held that the regulation was not punitive on its face. *West* v. *Bergland, supra,* 611 F.2d at 722, n.14.[3] Both the

[3] The Court of Appeals did agree that the Secretary could not use this implied sanctioning power for "penal" purposes, or to "stigmatize" an individual. The Court of Appeals held, however, that a judicial challenge based on such grounds, must await judicial review of an actual "sanction" imposed by the Secretary. *West* v. *Bergland,* 611 F.2d 710, 722 n.14 (8th Cir. 1979).

District Court and the Court of Appeals appear to have agreed that *if* the sanction was punitive in nature, the regulation would be a nullity because it has been issued without any express authority from Congress. *Compare, Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978); *Securities and Exchange Commission* v. *Sloan,* 436 U.S. 103 (1978).

Petitioner filed a petition for rehearing and suggestion of rehearing en banc, contending that:

(1) the Secretary's own use of 7 C.F.R. §53.13(a) against Petitioner demonstrated that it was unquestionably being used for a penal purpose and, therefore, its use should be enjoined, and

(2) Under this Court's holding in *Securities and Exchange Commission* v. *Cherney Corporation,* 318 U.S. 80 (1942), and its unbroken line of progeny, a discretionary order or regulation, such as 7 C.F.R. §53.13, must be upheld by the court, if at all, on the same basis which the administrator had himself invoked.

Since the Secretary had relied *solely* upon §203 of the Act to sustain the regulation, and since *both* the regulation and the "complaint" filed against Petitioner rely solely upon §203, Petitioner contended the Secretary could not fall back on another provision of the Act, §205 in an effort at *post hoc* rationalization of authority for the regulation.

On January 14, 1980, the Court of Appeals denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

(1) The questions presented here are of very substantial importance in federal administrative law. The "implied power" concept accepted by the courts below is both inconsistent with decisions of this Court and, in the context of implied "sanctions", dangerous. Congress regularly enacts statutes directed at research and development of desirable goals, and frequently enacts such statutes as part of an interrelated state-federal plan. Congress did so here. Because such statutes are usually technical and innocuous in language and beneficent in purpose, statutes such as these frequently pass the Congress, as did this one, with little discussion, and without objection, *if* the author, sponsor or floor leader in charge of the legislation assures his colleagues that the proposed Bill is *purely* a research and development Bill *containing no grant of substantive power* to a federal agency. That is what happened here.

In response to a pointed, and carefully-worded, inquiry from Senator Robert A. Taft, a principal Republican leader in the Senate in 1946, Senator Richard B. Russell, *the Senate Floor Manager for the Bill which became the Agricultural Marketing Act, assurred and reassurred Senator Taft, and his colleagues, that the Bill which he was managing "does not in any wise extend the power of the Department of Agriculture"; that "it does not to the slightest degree make any such provision"; and that "it is strictly a research Bill."* 92 Cong. Rec., Part 8, 79th Cong., 2d Sess.

at 10,370, *et seq.* (emphasis added). The colloquy is set forth in full in the footnote below.[4]

It is obvious that, upon the express representations of Senator Russell to his colleagues, the Agricultural Marketing Act was passed "without objection." *Id. Cf., Simpson* v. *United States,* 435 U.S. 6, 13-14 (1978); *Lewis* v. *United States,* ___ U.S. ___, 48 U.S.L.W. 4205, 4207 (1980).

An administrator's claim of vast implied power to impose grave sanctions, such as an indefinite withdrawal of the statutory services Congress established, should, plainly, be viewed with *great* skepticism under such circumstances. No one suggests that Senator Russell openly lied to his colleagues. The Court of Appeals suggested, in substance, that Senator Russell did not understand the Bill he was manag-

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[4] "Mr. Taft. Mr. President, will the Senator yield?

Mr. Russell. I yield.

Mr. Taft. Does this Bill *in any way* extend the *power* of the Department of Agriculture * * * or is it strictly confined to research?

Mr. Russell. It does *not* in any wise *extend* the *power* of the Department of Agriculture or any of its subdivisions.

Mr. Taft. Either to buy or sell or *regulate* production?

Mr. Russell. *It does not to the slightest degree make any such provision.* It provides *wholly* for research.

Mr. Taft. *There are a couple of very general statements contained in the Bill which I had not read with care,* so I could not judge whether the language was sufficiently broad to cover other activities.

Mr. Russell. *It is strictly a research Bill.*"

92 Cong. Rec., Part 8, 79th Cong., 2d Sess. at 10,370, *et seq.* (July 29, 1946) (Emphasis added).

ing and that, despite his representations, great power was secreted within the interstices of this "pure[] research Bill."

This theory contains a serious and important error which warrants plenary review here; it is gravely flawed both in principle and in practical effect; and it cannot be reconciled with a host of decisions of this Court of which *Securities and Exchange Commission* v. *Sloan, supra,* and *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 187-192 (1978), are sufficient examples. In words this Court has very recently reemphasized,

> "[i]nasmuch as Senator [Russell] was the sponsor and floor manager of the bill, his statements are entitled to weight." *Lewis* v. *United States,* ____ U.S. ____, 48 U.S.L.W. 4205, 4207 (1980).

Judge Friendly has put the proper perspective on the question here presented with felicity.

> ". . . It is unrealistic to suppose that all the legislators and the chief executive have made a meticulous study of the text of such complex measures as the Internal Revenue Code or the Immigration and Nationality Act; very likely most of them know only of the general purpose, *relied for the details on members who sat on the committees particularly concerned,* and were quite willing to adopt these committees' will on subordinate points as their own."

For this reason, *"a court does pretty well to read the statute to mean what the few legislators having the greatest concern with it said it meant to them."* H. Friendly *Benchmarks, Mr. Justice Frankfurter and the Reading of Statutes,* p. 215-216 (1st Ed. 1967). (emphasis added).

Judge Friendly's perceptive appreciation of the realities of the legislative process is surely applicable to a research and development Bill such as the Agricultural Marketing Act of 1946.

This Court has often expressed the same awareness of the realities of the federal legislative process, and the importance of statements of sponsors of technical or apparently non-controversial legislation. *See, e.g., Simpson* v. *United States, supra; Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U.S. 384, 391, 392, 395 (1951); *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 616 (1944).

(2) The foregoing rule is an indispensable tool of judicial construction for twentieth century legislation at the federal level. It is simply not physically possible for all Members of Congress, or even a majority of them, to read and study in detail every Bill upon which they are required to vote during a Session. Thus, in the absence of some particular interest which an individual Member of Congress may have, *and* in the absence of a Bill which is obviously controversial, *or* plainly deals with a matter of large public importance, the *categorical* representation of a respected senior Senator — in response to a very-carefully phrased inquiry by one of his senior colleagues — that the particular Bill he is managing contains *no* grant of power whatsoever; that it "provides wholly for research"; and that it is "strictly a research Bill" must be held to preclude an administrative agency from transforming "strictly a research Bill" into a statute which grants to the administrator the discretionary power to impose *severe "sanctions"*

for alleged "misconduct." *Especially* is this true when *the statute itself* contains a specific penalty provision to be imposed by the United States District Courts. That is precisely the case with regard to 7 U.S.C. §1622(h). *Cf., Lewis, supra; Simpson, supra; Chandler* v. *Roudebush,* 425 U.S. 840, 851-852, 863-864 (1976).

It is also the situation which exists in regard to a plenitude of Bills which are enacted during every Session of Congress "without objection", on the sponsor's representation that the Bill is simply a Bill dealing with matters of research and of state-federal coordination toward desirable goals. Allowing a grant of great and grave "implied" power, which may be exercised in the form of harsh sanctions against private citizens, to be derived solely from the interstices of a piece of research legislation, such as the Agricultural Marketing Act of 1946, is inconsistent with the necessary premises of modern government at the federal level. That is why this Court has said "it is the sponsors" whom the Court will "look to when the meaning of the statute is in doubt", especially when the sponsors speak "without contradiction." *Algonquin, supra,* 426 U.S. 564. In two major decisions within the past two Terms, this Court has refused to indulge a presumption of "implied" administrative power even when it unquestionably appeared from the record that the Committees of Congress *having jurisdiction over the agency approved of the implied power which the agency had been exercising,* in one case for more than *thirty years. Securities and Exchange Commission* v. *Sloan,* 436 U.S. 103 (1978); *see also, Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 187-192 (1978)).

We submit that such cases as *Sloan, Hill and Lewis* control *a fortiori* here. If they do not, Congress, the bar, and a citizen facing severe sanctions surely should be made aware of the reason for the distinction by plenary review from this Court. *Cf, Detroit Edison Company* v. *National Labor Relations Board,* ___ U.S. ___, 99 S.Ct. 1123, 1131-1133 (1979). Administrative power to regulate, and even to sanction, is, of course, essential to modern government. But it is axiomatic that such power does not come into being by Congressional acquiescence (*Tennessee Valley Authority* v. *Hill, supra*), nor by mere desire of an administrator to have it (*Securities and Exchange Commission* v. *Sloan, supra*), not by a notion of existence coming from mere unchallenged use for a period of time (*Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Sloan, supra*).

The decision below is wholly inconsistent with the principles, purposes and policies announced in those decisions. Moreover, the rationale of the Court of Appeals below is irreconcilable with the fundamental premise that, *especially* when dealing with penalties and sanctions, both citizens and the attorneys from whom they seek advice, are entitled to assume a statute means no more than what it says (*Adamo Wrecking Co.* v. *United States,* 434 U.S. 275 (1978)), particularly when the "uncontradicted" statements of the principal sponsor and floor manager for the legislation are in accord with the natural reading of the statutory language, *Algonquin, supra,* 426 U.S. at 564, and, even more especially, when the sponsors "were at pains" to *deny* to their colleagues that any grant of power or change in the law was secreted within proposed legislation. *Standard Oil Co.* v. *United States,* 337 U.S. 293, 312 (1949).

The holding below that the Secretary possesses "implied" power to impose harsh sanctions upon a private citizen for alleged "misconduct" *in addition to* the specific sanction of fine and imprisonment legislated by Congress *in a research Bill* is, thus, both wrong in principle and dangerous as precedent.

It presents a very substantial question of federal law which should be given plenary review. *Adamo, supra; Sloan, supra; Hill, supra; Brannon* v. *Stark,* 342 U.S. 451; *Zuber* v. *Allen,* 396 U.S. 168 (1969).[5]

(3) The claim to an "implied" administrative power to sanction for misconduct is especially weak here, and its sustention would be in particular tension with prior decisions of this Court, in light of the fact that, when Congress *has* intended the Secretary of Agriculture to possess the power to suspend services, Congress has *always* granted such power by explicit statutory provisions. These statutes abound throughout Title 7 and Title 21. A number of such statutes are set forth in the margin.[6] Such provisions are

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[5] It should be noted that this is *not* a case involving consistent agency definition of a "term of art", such as *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978), *nor* an *express,* conscious decision by Congress to delegate broad power, such as *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356 (1973). *Compare, Zenith* and *Mourning with, International Brotherhood of Teamsters* v. *Daniel,* ..... U.S. ....., 99 S.Ct. 790, 799-800 and nn. 20-22 (1979) *and, Southeastern Community College* v. *Davis,* ..... U.S. ....., 99 S.Ct. 2361, 2369-2370 (1979).

[6] 1. The Packers and Stockyards Act, 7 U.S.C. §201 *et seq.* (*See especially,* the *express* suspension power in 7 U.S.C. §204).

2. The Warehouse Act of 1916, 7 U.S.C. §241 *et seq.* (same; *see,* 7 U.S.C. §247.

conspicuous by their absence in the Agricultural Marketing Act. This, of itself, is significant evidence that Congress did *not* intend to grant the claimed power as part of an enactment described by its sponsor as "strictly a research Bill." *See, Adamo Wrecking Co., supra,* 434 U.S. 275, 287-288 and n.5; *Algonquin, supra,* 426 U.S. at 564; *National Woodwork Mfgs. Assn.* v. *National Labor Relations Board,* 386 U.S. 612, 640 (1967); *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 290-291 (1964).

Indeed, in view of the array of statutes set forth in the margin, embracing a period of three-quarters of a cen-

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[6] (Continued)

3. The Perishable Commodities Act of 1934, 17 U.S.C. §499 *et seq.* (same; *see especially,* 7 U.S.C. §499(h)).

4. The Commodity Exchange Act of 1922, as amended by the Commodities Futures Trading Act of 1974, 7 U.S.C. §1, *et seq.* (same; *see,* 7 U.S.C. §6(n)).

5. The Sugar Act of 1958, 7 U.S.C. §1100 *et seq.* (same; forfeiture provision, *see,* 7 U.S.C. §1155).

6. The International Wheat Agreement of 1949, 7 U.S.C. §1641 *et seq.* (same; forfeiture power, *see,* 7 U.S.C. §1642(d)).

7. The Food Stamp Act, 7 U.S.C. §2011 *et seq.* (same; *see especially,* the *detailed* administrative proceeding for *disqualification* to participate).

8. The Laboratory Animal Welfare Act, 7 U.S.C. §2131. (same; *see,* 7 U.S.C. §2134).

9. The Toxic Substances Act, 21 U.S.C. §151. (same; *see especially,* the *specific* provision for suspension, 21 U.S.C. §156).

10. The Poultry Products Inspection Act, 21 U.S.C. §451. (same; *see especially,* 21 U.S.C. §467).

11. The Wholesome Meat Act, 21 U.S.C. §601 *et seq.* (same; *see especially,* 21 U.S.C. §671).

12. The Agricultural Commodities Futures Trading Act, 92 Stat. 876, Public Law 95-405 (enacted September 30, 1978 *to be codified as,* 7 U.S.C. §22(1). (same).

tury, it would be remarkable, indeed, if the Secretary has the extraordinary harsh sanctioning power which he here claims, by mere implication. It would be even more extraordinary if such implied power could be invoked as a "sanction" for alleged "misconduct" merely because the Secretary believes he should have a "panacea for every type of problem which [he] believes may beset the marketplace." *Securities and Exchange Commission* v. *Sloan, supra,* 436 U.S. at 112.[7] This Court said in *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618 (1944), "The idea which is now sought to be read into the grant by Congress . . . beyond the plain . . . implication of [its words] is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it." In this case, as the Secretary frankly conceded in his brief in the Court of Appeals, "Congress *did not* expressly say in the Agricultural Marketing Act of 1946 . . .", *West* v. *Bergland,* No. 79-1711, Brief for Appellees, p. 35 (emphasis

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[7] The court below held *Sloan* inapplicable on the theory that *Sloan* was essentially a "due process" case, and that this Court's principal concern was the *summary* nature of the suspension power there claimed. *West* v. *Bergland, supra,* 611 F.2d 710, 722. The summary nature of the suspension power claimed by the Securities and Exchange Commission in *Sloan* may have *exacerbated* the infirmity of its practice, but it is clear that this Court's holding focused on the *power* to *suspend,* an "awesome power with a potentially devastating impact", 436 U.S. at 110. It was the *nature* of the *power,* not merely the manner of its exercise, which this Court found required a "clear mandate from Congress." *Id. Cf, Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287-288 and n.5 (1978). We submit it is clear that the result in *Sloan* would have clearly been the same had the Commission gone through the motions of a "notice and hearing" procedure before suspending. The asserted "distinction" simply cannot be reconciled with this Court's language, or its holding.

added), that the Secretary was to have the discretionary power to impose sanctions against a private citizen by suspending services from him for alleged "misconduct", let alone suspending vital services from a citizen for a period of unlimited duration.

Since this is conceded, the decision below should be reviewed and reversed. *Securities and Exchange Commission* v. *Sloan, supra; Tennessee Valley Authority* v. *Hill, supra; Federal Maritime Comm.* v. *Seatrain Lines, supra.*

(4) Even if it be assumed the Secretary might have the implied suspension power which he claims, the decision below should be given plenary review since it proceeds upon a misapprehension of a principle of administrative law which has been both familiar and fundamental in this Court since *Securities and Exchange Commission* v. *Cherney Corporation,* 318 U.S. 80, was decided in 1942: the principle that a discretionary decision by an administrator may be upheld on judicial review, if at all, *only* on the same basis as was articulated by the administrative agency itself, and not by *post-hoc* rationalizations offered by government counsel during litigation.

In sustaining the Secretary's claims of implied power to suspend indefinitely a private citizen from using the meat grading and inspection services Congress has commanded the Secretary to make available to all, both the district court and the court of appeals accepted the suggestion of litigation counsel for the Secretary, and relied in large part upon §*205* of the Agricultural Marketing Act.

Since the Secretary himself had *never* claimed "sanctioning" power under *any* section except §*203(h),* and since

both 7 C.F.R. §53.13(a) *and* the administrative "complaint" filed against Petitioner state the authority for their validity to be *solely §203(h),* it is apparent that reliance upon §205 is foreclosed. With reliance upon §205 gone, it is plain the challenged regulation cannot stand. Appellate counsel for the Secretary cannot justify a discretionary regulation by *post-hoc* reference to a statutory provision which *was not invoked by the Secretary when he promulgated the regulation.* That has been an unvarying rule of administrative law for almost forty years. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 87 (1942); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169 (1962); *Federal Power Commission* v. *Texaco, Inc.,* 417 U.S. 380, 396-397 (1974).

Prior to the decision of the Court of Appeals below, this rule had been followed by every Court of Appeals with invariant fidelity. *See,* e.g., *National Labor Relations Board* v. *Clark,* 468 F.2d 459, 467 (5th Cir. 1962) (Wisdom, J.); *Trailways of New England, Inc.* v. *Civil Aeronautics Board,* 412 F.2d 926, 931 (1st Cir. 1969) (Aldrich, C. J.).

The Secretary is surely familiar with this "simple but fundamental rule of administrative law" (*Burlington,* 371 U.S. at 168, *quoting, Cherney,* 332 U.S. at 194), since the Secretary has *himself successfully* invoked this bedrock principle at least twice (once in this Court) to set aside the order of a sister administrative agency: the Interstate Commerce Commission. *Atchison T. and S.F. Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 807 (1973); *Secretary of Agriculture* v. *Interstate Commerce Commission,* 551 F.2d 1329, 1331 (D.C. Cir. 1977). Despite the heretofore unvarying application of this principle, appellate counsel

for the Secretary invoked §205 of the Act, and the Court of Appeals below relied heavily indeed upon §205. Indeed, §205 is the core of *both* the initial and concluding paragraphs of the Court of Appeals which deal with the merits. 7 C.F.R. §53.13(a) was, thus, sustained almost entirely by invocation of §205. *West* v. *Bergland, supra,* 611 F.2d 710, 720-721, 725.

But, since the *Secretary* relied *only* upon §203(h) in claiming the authority to issue the "misconduct" sanctions of 7 C.F.R. §53.13(a) *and* in initiating the administrative "complaint" against Petitioner, it is plain that this case must, at the least, be remanded to the Court of Appeals for reconsideration of the question whether 7 C.F.R. §53.13(a) can stand under §203(h) of the Act, 7 U.S.C. §1622(h) *alone. Texaco, supra,* 417 U.S. at 396-397; *Wichita Board, supra,* 412 U.S. at 808; *Burlington, supra,* 371 U.S. 168-169; *Chenery, supra,* 318 U.S. 87-88.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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April, 1980

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this _____ day of April, 1980, mailed three true and correct copies of the above and foregoing Petition for Writ of Certiorari to the Honorable Wade H. McCree, Solicitor General, Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530 and two true and correct copies to Messrs. Raymond W. Fullerton, Esq. and Marshal Marcus, Esq., Office of General Counsel, Department of Agriculture, Washington, D.C. 20250.

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B. J. Rothbaum, Jr.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1711

Frank R. West, Appellant, v. Bob Bergland, Secretary of the Department of Agriculture, and Donald Houston, Acting Administrator of the Food Safety and Quality Service of the Department of Agriculture, Apellees.	Appeal from the United States District Court for the District of Nebraska

Submitted: October 11, 1979
Filed: December 19, 1979

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The appellant, Frank R. West, sought to have the district court[1] enjoin the Secretary of Agriculture from holding an administrative hearing to determine whether the Secretary's meat grading and acceptance services should be withdrawn for misconduct. West challenged the regulation under which the Secretary was proceeding as invalid. This appeal is from the district court's denial of injunctive re-

[1]The Honorable Robert V. Denney, District Court Judge for the District of Nebraska.

lief. The issues are (1) whether West must exhaust his administrative remedies before bringing judicial challenge to the regulation, and (2) if not, whether the regulation is authorized by statute. We affirm the district court's decision to reach the question of the regulation's validity and to uphold it as impliedly authorized by statute.

I. Factual Background.

Appellant West is engaged in the business of buying and selling livestock. In this capacity he receives meat grading and acceptance services from the Department of Agriculture pursuant to section 203(h) of the Agricultural Marketing Act of 1946.[2] On January 14, 1977, West was convicted, after his plea of guilty, of conspiring to violate 21 U.S.C. §§ 610(c) and 676 in causing meat to be misbranded, in violation of 18 U.S.C. § 371. A charge relating to West's plea was that he had caused employees to make gifts to a federal meat grader.

On August 9, 1977, the Administrator of the Food Safety and Quality Service filed an administrative complaint against West in a proceeding before the Secretary of Agriculture.[3] The complaint alleged that West had knowingly authorized the bribing of a federal meat grader. The complaint proposed, under the authority of 7 C.F.R.

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[2]7 U.S.C. § 1622(h). For a brief history of federal beef grading, see *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 232-33 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

According to West, he is consultant to two meat packing companies, American Beef Packers, Inc. and Union Beef Packing Company, both located in Omaha, Nebraska. In 1973-74 West was president of American Beef Packers. West and the companies for which he works also receive federal meat inspection services, which are not involved in this case.

[3]The complaint also named American Beef Packers, which is not a party to this action. To simplify, we will refer to the parties as "West" and "the Secretary of Agriculture" (or "the Secretary").

§ 53.13(a) (1977),[4] to withdraw grading and acceptance services from West "for a period of time necessary to insure the integrity of the Meat Grading and Acceptance Service, and such additional time as may be required until [West] can prove to the Service that necessary safeguards have been provided to assure [he] will not in the future violate the Agricultural Marketing Act of 1946 or the regulations issued under it]." Withdrawal will not become effective in this case, however, until a final agency order adverse to West. In the meantime West may continue to receive grading and acceptance services.

On February 13, 1979, West filed a complaint in federal district court to prevent the initiation of the administrative hearing and secured a temporary order that restrained the Secretary from proceeding any further.[5] After briefs and oral arguments, however, the district court dissolved the temporary restraining order and denied West's application for permanent injunctive relief.

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[4]This regulation has been redesignated during the pendency of this action and now appears at 7 C.F.R. § 2853.11(a) (1979). For purposes of convenience, we will continue to refer to it as section 53.13(a). Its relevant portion reads:

> Denial or withdrawal of service.
>
> (a) *For misconduct*—(1) *Bases for denial or withdrawal.* • • • [T]he benefits of the service may be [withdrawn] • • • from any person who • • • (ii) has given or attempted to give, as a loan or for any other purpose, any money, favor, or other thing of value, to any employee of the Department authorized to perform any function under the regulations • • •.

withdrawal normally occurs pursuant to an administrative hearing. *See* 7 C.F.R. § 2853.11(a)(2), *citing* 7 C.F.R. Part 2850.

[5]Between the filing of the administrative complaint in November 1977 and West's suit for injunctive relief in February 1979, West had twice sought to have the Secretary's proceedings enjoined on grounds unrelated to this action. West filed his answer to the administrative complaint on November 9, 1978. During oral argument we were advised that no hearing has yet been held.

II. Whether Administrative Remedies Must Be Exhausted.

West makes no claim that regulation 53.13(a) runs counter to any express statutory limit to the Secretary's authority. Rather, he argues that the nature of the regulation is such that it must be expressly authorized, and that it is not. Alternatively, he argues that any implied authorization is negated by legislative history, the tone of the statute, and congressional practice with respect to related statutes. The Secretary responds that a court should not even consider West's contentions except upon appeal from a final agency decision. West rejoins that because the regulation is void there are no valid administrative remedies to exhaust. The district court did not expressly address these contentions but implicitly held that exhaustion was not reguired.[6] We agree.

Normally, a litigant is not entitled to a judicial hearing on the merits of his claim until he has exhausted available administrative remedies. *E.g., Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51 (1938). This is not a rule to be applied

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[6]Because the administrative hearing is still at the pre-hearing stage, West has exhausted no adminisrative remedy. The briefs of both parties reflect the misapprehension that the district court required exhaustion of administrative remedies on the question of agency jurisdiction. In fact, the district court reached this question in upholding the regulation, and in doing so implicitly held exhaustion was not required as to this question. Had the court wanted to require exhaustion, it would have declined to consider the question of agency jurisdiction until administrative remedies on that question were exhausted. *See, e.g., Bolger* v. *Marshall*, 193 F.2d 37, 39 (D.C. Cir. 1951) (resolution of exhaustion issue a prerequisite to entertaining the merits). The court did conclude that West "[shall be required] to exhaust his administrative remedies." The opinion as a whole, however, reveals that the court was requiring West to exhaust administrative remedies on the *remaining* questions, including the question whether withdrawal of meat grading and acceptance services would be appropriate in his particular case. It may be that the court pretermitted the exhaustion issue with respect to agency jurisdiction because it thought it was inadequately presented in the record and thought the merits clearly against the plaintiff. *See Adams* v. *Vance*, 570 F.2d 950, 954 n.7 (D.C. Cir. 1978) and cases cited therein.

woodenly, however. Except in those cases where exhaustion of administrative remedies is specifically required by statute, *see, e.g., Weinberger* v. *Salfi,* 422 U.S. 749, 766 1975), administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further. This is the general test our court adopted in *United States* v. *Newman,* 478 F.2d 829, 831 (8th Cir. 1973).

A. *Governmental Interests in Requiring Exhaustion.*

We begin by considering the government interests in requiring West to exhaust his remedies on the question of agency jurisdiction, mindful whether "allowing all similarly situated [individuals] to bypass [the administrative avenue in question] would seriously impair the [agency's] ability to perform its functions." *McGee* v. *United States,* 402 U.S. 479, 484 (1971). First among these governmental interests is that of allowing the agency to "perform functions within its special competence." *Parisi* v. *Davidson,* 405 U.S. 34, 37 (1972). These functions include specialized fact-finding, *e.g., Lone Star Cement Co.* v. *FTC,* 339 F.2d 505, 512 (9th Cir. 1964), interpretation of disputed technical subject matter, *e.g., Weinberger* v. *Bentex Pharmaceuticals,* 412 U.S. 645, 653-54 (1973), and resolving disputes concerning the meaning of its own regulations, *e.g., City of New York* v. *New York Telephone Co.,* 468 F.2d 1401, 1403 (Temp. Emer. Ct. App. 1972). Despite the Secretary's contentions to the contrary, we do not think the judicial policy of deferring decision until an administrative agency has excercised one or more of these functions is strongly implicated in this case. First, the relevant facts appear on the face of the pleadings, and they are not of such a nature that the agency is best equipped to interpret them.[7] Sec-

[7]The Secretary points out that the administrative pleadings suggest three arguably specialized factual questions that bear on the jurisdictional issue presented: (1) whether West bribed a federal meat grader; (2)

ond, there is no question that the regulation, if valid, authorizes the Secretary to withdraw the services provided under the Act. The only question on which West seeks to avoid exhaustion is not one requiring application of specialized agency understanding, then. It is one well within judicial competence: whether the regulation is authorized by the statute.

A second government interest in requiring exhaustion is discouraging "frequent and deliberate flouting of the administrative process." *United States* v. *Newman, supra.* This interest is strongest where a grant of judicial review would induce individuals to frustrate agency process by challenging agency action only after the opportunity for agency decision has passed. *E.g., McGee* v. *United States, supra,* 402 U.S. at 491 (selective service registrant convicted of failing to submit to induction twice sidestepped administrative review of his draft classification in order to "take a chance" in court on his defense of erroneous classification). This interest is not particulaly prominent here, for a grant of judicial review under the present circumstances would not encourage individuals in West's gen-

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[7] (Continued)

whether bribing a federal meat grader would justify withdrawal of meat grading services under 7 U.S.C. § 1622(h) and regulation 7 C.F.R. § 53.13(a); and (3) whether meat grading services facilitate the marketing of meat and livestock.

None of these disputes is germane to agency jurisdiction. The first two disputes concern whether West has committed an instance of misconduct that might justify application of regulation 53.13; they are irrelevant to the threshhold question whether 53.13 validly grants the Secretary any authority at all. The third dispute, although presumably well-suited for initial agency determination, is also irrelevant to the jurisdictional question. That question does not turn on whether the regulation will actually promote the statute's purposes, one of which is the marketing of meat and livestock, but, according to the standard the Secretary himself would urge, whether the regulation is "reasonably related" to the statute's purposes. *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973).

eral situation to sidestep agency process. This is not a case where remedies lie unused in the past. West brings this challenge ahead of agency action, not after the opportunity for application of agency expertise is gone. Nor would a grant of immediate judicial review in this case encourage individuals in West's position to seek early review on insubstantial questions in order to gain delay. We recognize that an exhaustion decision requires attention to the particular administrative scheme involved, and that the Secretary's ability to administer grading services for a large variety of products may be at stake.[8] But West's claim is out of the ordinary. It requires no application of special agency competence and, while not manifestly compelling on its merits, is not frivolous, either. It presents a question of first impression and is not easily rejected. We doubt, then, that early review of questions of this sort will induce litigious interruption of the agency's enforcement program. Courts are well equipped to deal with such tactics should they arise. "Insubstantial claims can usually be weeded out with dispatch." *Oestereich* v. *Selective Service System*, 393 U.S. 233, 242 (Harlan, J., concurring). *See also Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 154-55 (1967).

Although these first two interests in administrative autonomy and efficiency thus do not loom large in this case, the exhaustion doctrine requires us to consider two other interests. The first is that in allowing the agency to have the first opportunity to develop the facts and apply the law it was designed to administer. As the Supreme Court explained in *McKart* v. *United States:*

> The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency

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[8] *See* note 9 *infra.* Of course, that there is an important general question involved may be a factor indicating the appropriateness of early judicial review. *See* L. Jaffe, Judicial Control of Administrative Action 435 (1965).

> develop the necessary factual background upon which decisions should be based. * * * And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

395 U.S. at 193-94. *Cf. McLish* v. *Roff*, 141 U.S. 661, 665-66 (1891). Permitting the agency to perform its "trial court" function not only serves interests in administrative autonomy and efficiency but also generally assists ultimate judicial review, if any should be necessary.

A second interests in administrative autonomy, which parallels an interest in judicial efficiency, is that of allowing agencies to correct their own errors, and in so doing moot controversies and obviate judicial review. *Parisi* v. *Davidson, supra.* We think this interest is but weakly implicated here. Although we see nothing in the record or the briefs to indicate that the jurisdictional challenges West mounts have ever been presented to the Secretary for his formal decision, Secretary's counsel remind us that "for more than [forty] years, the Secretary has ruled that he was empowered to impose administrative sanctions * * * to assure that his grading services are upright." Appellee's Brief at 37. In any event, we think it improbable that the agency, having brought its complaint on the strength of regulation 53.13(a), will suddenly agree with West that it is void. A further reason to expect no vacillation on the part of the Secretary is that the regulation, in place now for some twenty years, is representative of a host of similar regulations relating to other agricultural products.[9] While the

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[9]The Secretary informs us that federal grading services are provided, subject to removal for misconduct, for a vast variety of fresh and canned produce, including asparagus, white potatoes, rabbits, and watermelons. *See, e.g.*, 7 C.F.R. § 2859.160 (1979) (permitting administrator to withdraw egg inspection services from persons convicted within prior ten years

mere probability of an adverse agency decision does not eliminate the interest in agency self-correction, *see Lone Star Cement Corp.* v. *FTC, supra; see generally Spanish Int'l Broadcasting Co.* v. *FCC,* 385 F.2d 615, 626 & n.50 (D.C. Cir. 1967), we cannot accord it much weight where, as here, the outcome is all but certain. *See, e.g., Diapulse Corp. of America* v. *FDA,* 500 F.2d 75, 78 (2d Cir. 1974).

Of course, there are other unresolved questions here, which if resolved in West's favor would obviate judicial review. For example, if West were to convince the Secretary that a withdrawal of meat grading and acceptance services would be unjustified, or unnecessary, under the circumstances, the controversy would be at an end. We note this factor, but cannot give it dispositive weight since it is a factor implicated in virtually any exhaustion case. *E.g., Touche Ross & Co.* v. *SEC,* No. 78-6095 (2d Cir. May 10, 1979) (judicial review of agency jurisdiction permitted ahead of agency determination whether suspension of privilege justified under the circumstances).

Our identification of the governmental interests in this case presupposes that there are, at least arguably, valid administrative remedies to pursue. West contends that there is no governmental interest here because "there is no properly authorized administraitve procedure for [him] to exhaust and * * * the administrative authorities who seek to determine [his] case have no lawful right to do so." *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 540 (1954); *cf. Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 562 (1919). We must reject this contention in its broadly based form, for to accept it would reduce the

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[9] (Continued)

of felony for mislabelling food). Invalidation of regulation 53.13(a) by the Secretary thus seems unlikely in that it would logically require invalidation of a large number of regulations permitting withdrawal of grading services for misconduct, with a presumably dramatic effect on the Secretary's grading program.

exhaustion doctrine to a nullity. *See* K. Davis, Administrative Law § 20.02 at 65, § 20.04 at 79 (1958). A person cannot evade agency process simply by claiming the agency is operating *ultra vires*.

This claim has justified early judicial review, however, in those cases in which agencies have transgressed clearly marked boundaries to their jurisdiction. West relies on two of these cases, *Oestereich* v. *Selective Service System, supra; Leedom* v. *Kyne*, 358 U.S. 184 (1958). Both cases admitted an individual to a judicial forum before the completion of prescribed procedures. In *Oestereich*, a theology student who had received the draft exemption he was statutorily entitled to was reclassified I-A after he had turned in his draft card in protest. The sole basis of the reclassification was a Selective Service regulation that plainly permitted the Service to reclassify those who had been "delinquent" in failing to retain their draft cards. The student, prior to induction, sought to enjoin the reclassification on the basis that the regulation was contrary to statute. The Court characterized the Selective Service Board's action as a "clear departure * * * from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness." 393 U.S. at 238. In *Leedom*, the National Labor Relations Board included professional employees in a collective bargaining unit without permitting them to vote whether to belong to that unit. Although there had been no final agency action, the employees were permitted to challenge the inclusion, in light of a specific statutory provision that proscribed inclusion of professional employees in a collective bargaining unit without their approval by majority vote. "Plainly, [the Board's inclusion] was an attempted exercise of power that had been specfically withheld. It deprived the professional employees of a 'right' assured to them by Con-

gress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." 358 U.S. at 189.

Here, by contrast, West can point to no statutory right that the Secretary is abridging, no specific statutory provision that the Secretary's proposed withdrawal of service would contravene. The Secretary is directed to provide grading services, but not unconditionally. His decision to provide these services only to those recipients who refrain from engaging in conduct detrimental to the service is by no means a "clear departure" from his statutory mandate or an abridgment of West's "statutory right."

B. *West's Interests in Securing Immediate Judicial Review.*

Having examined the government interests in this case, we turn to an examination of the individual's interests in an immediate judicial resolution, before considering whether the balance of interests favors requiring exhaustion of administrative remedies. To justify judicial interference with agency process that is not clearly *ultra vires*, an individual must, generally speaking, show some "exceptional circumstance." *See United States* v. *Newman, supra.* Courts have traditionally required the individual to make a cogent showing that denial of judicial review will subject them either to "irreparable injury" or an "inadequate remedy." *See, e.g., Bannercraft Clothing Co.* v. *Renegotiation Board,* 466 F.2d 345-355-56 (D.C. Cir. 1972), *rev'd on other grounds,* 415 U.S. 1 (1974). *Public Utilities Comm.* v. *United Fuel Gas Co.,* 317 U.S. 456, 469 (1943); continued subjection to a challenged regulation due to unreasonable administrative delay in responding to the challenge, *e.g., Smith* v. *Illinois Bell Telephone Co.,* 270 U.S. 587, 591 (1926); loss of first amendment freedoms, *Wolff* v. *Selective Service Loal Board No. 16,* 372 F.2d 817, 825 (2d Cir. 1967); and the immediate destruction or loss of the very substantive right that the individual seeks to protect, *e.g., McKart* v. *United States, supra,* 395 U.S. at 203 (criminal defendant's complete de-

fense of erroneous draft classification would be wholly lost, absent judicial review); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 306 U.S. 56, 59-60 (1939) asserted right of confidentiality would be destroyed by agency publication, absent immediate judicial review). West's claim of irreparable injury fall within none of these categories. First, he claims that "the proceeding itself constitutes irreparable injury" because he cannot recover its costs should the Secretary prove to be without jurisdiction. The unrecoupable expense of litigation, however, is not the irreparable injury contemplated as a prerequisite to equitable relief. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Second, West claims that he is irreparably injured in that deprivation of meat grading services constitutes irreparable injury. He will not be so deprived, however, if he is deprived at all, until the conclusion of agency proceedings, or, if a stay is granted, until judicial review.[10] *See, e.g., Arrow Meat Co.* v. *Freeman*, 261 F. Supp. 622, 624 (D. Ore. 1966) (thirty days' suspension of meat grading services stayed until judicial review). Any deprivation that will occur, then, is that which inevitably accompanies an agency proceeding of this sort.

Nor does West clearly demonstrate that his remedy is otherwise inadequate.[11] West cannot rely on *Skinner &*

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[10]On oral argument, West's counsel conceded, and the Secretary's counsel assured us, that West would continue to receive meat grading services until final agency action.

[11]Of course, the concepts of irreparable injury and inadequate remedy are not wholly distinct. The instances cited above as examples of irreparable harm could also be characterized as examples of inadequate remedy; the remedy was inadequate to prevent irreparable harm. Generally, however, the litigant faces irreparable injury if judicial nonintervention results in harm of an extraordinary nature, and the litigant faces an inadequate remedy, even if his harm is not out of the ordinary, if the agency's limited power to grant relief or the agency's hostile attitude makes it impossible or highly improbable that the litigant will obtain the relief he seeks. *See* K. Davis, Administrative Law Treatise § 20.07 (1958).

Eddy Corp v. *United States, supra,* in which the party challenging an agency's statutory authority to approve a rate hike without a prior hearing could attack the rate before the agency only as "unreasonably high or discriminatory." *See Jewel Co.* v. *FTC,* 432 F.2d 1155, 1158 (7th Cir. 1970); L. Jaffe, Judicial Control of Administrative Action 428 (1965). Here, West may challenge the statutory authority for the agency's action before the agency itself. *See generally, e.g., California* v. *FTC* 549 F.2d 1321, 1324 (9th Cir. 1977) (as a general rule, an agency should initially determine its own jurisdiction). And West can in any event obtain ultimate judicial review of the agency decision. Compare *Texaco, Inc.* v. *FTC,* 301 F.2d 662, 663 (5th Cir. 1962).

West can, however, point to the probability of adverse agency decision on the question whether regulation 53.13(a) is valid and argue that his administrative remedy is "inadequate" because futile. *See* L. Jaffe, *supra,* at 449. *But see Lone Star Cement Corp.* v. *FTC, supra.* The Second Circuit, in a recent case that also involved a pre-hearing challenge to the validity of an agency's enforcement regulation, declined to require exhaustion because, among other reasons, it was not likely that the agency would declare that its own long-standing regulation was statutorily unauthorized. *Touche Ross & Co.* v. *SEC,* No. 78-6095, slip op. at 2574 (2d Cir. May 10, 1979).

The *Touche Ross* court indicated that the harm that would be sustained by litigant if he is required to exhaust his administrative remedies is a relevant factor to consider, but not controlling. The court opined that the Supreme Court has not made irreparable injury an inflexible prerequisite to avoiding exhaustion. While we do not necessarily share the Second Circuit's certainty concerning the

attitude of the Supreme Court,[12] we continue to believe that the proper approach toward exhaustion is the balancing of individual and governmental interests that was suggested by the Supreme Court in *McKart* v. *United States, supra,* and adopted by our court in *United States* v. *Newman, supra,* which we have elaborated upon here. Classic irreparable harm or inadequate injury may be required, of course, to outweigh governmental interests where they are strongly implicated. Where they are not, however, factors of litigation expense or loss of reputation may become significant. *See Touche Ross & Co.* v. *SEC, supra,* slip op. at 2563-74 (declining to require exhaustion on ground of inadequate government interest, without requiring clear showing of irreparable injury); *Finnerty* v. *Cowen,* 508 F.2d 979, 982-83 (2d Cir. 1974) (same); *Diapulse Corp. of America* v. *FDA, supra,* 500 F.2d at 77-78 (same); *Consumers Union* v. *Cost of Living Council,* 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.), *cert. denied,* 416 U.S. 984 (1974) (same); *Pan American World Airways, Inc.* v. *Boyd,* 207 F. Supp. 152, 160 (D.D.C. 1962) (alternative holding) (same).

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[12]The Second Circuit appeared to use irreparable injury to include both irreparable injury and inadequate remedy as we have used those terms. Recent opinions of the Supreme Court might be read to indicate that irreparable injury is absolutely required if exhaustion is to be avoided. *E.g., Renegotiation Bd.* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 23-26 (1974); *see Moore* v. *East Cleveland,* 431 U.S. 494, 522-29 (1977) (Burger, C.J., dissenting). We suspect that the Supreme Court would take a flexible approach, however, if squarely confronted with the issue, in light of its opinions in *McKart* and *McGee.*

> We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on [the individual]. Even if there is no such compelling interest when [this individual's] case is viewed in isolation, we must also ask whether allowing all similarly situated [individuals] to by-pass administrative * * * procedures would seriously impair the [agency's] ability to perform its functions.

McKart v. *United States, supra,* 395 U.S. at 197 (1969).

C. *Balancing of Interests.*

Reviewing the foregoing, we perceive an arguable claim that the basis of the Secretary's power to proceed is facially invalid. The question of validity involves no dispute of fact that is necessary to a decision, no specialized understanding that an agency would be likely to contribute. Instead, the issue is one of statutory construction and can be decided on the pleadings. Although the litigant does not clearly satisfy the classic requirements of equitable relief, requiring him to resort first to the administrative process will subject him to unrecoverable loss in the form of litigation expense. This cost, although "part of the social burden of living under government," *Petroleum Exploration, Inc.* v. *Public Service Commission,* 304 U.S. 209, 222 (1938), is not a burden we should impose too blithely. Here, given that the agency is bringing a proceeding on the basis of the very regulation in question, and given that the regulation has been followed regularly and is representative of a family of similar regulations, we believe the agency's view of the regulation's validity is virtually immutable, and that expenses incurred to challenge the regulation within the agency will be expended in vain, without any compensating clarification of the issue. Although the question is close, we conclude that the district court acted within its discretion in declining to require exhaustion. We now turn to the merits.

III. Whether Regulation 53.13(a) is Authorized by Statute.

As with any matter of statutory construction, we begin with the language of the statute. *Southeastern Community College* v. *Davis,* 47 U.S.L.W. 4689, 4691 (1979). Section 203(h) of the Agricultural Marketing Act of 1946 (the Act) directs and authorizes the Secretary of Agriculture to certify the grade of agricultural products, "except that no person shall be required to use the service authorized by this subsection." 7 U.S.C. § 1622(h) (hereinafter referred

to as section 1622 (h)). Section 205(b) of the Act further provides that the Secretary "shall promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter." 7 U.S.C. § 1624(b).

Within two years of the Act's passage the Secretary issued 7 C.F.R. § 53.12 (1949), which permitted him to suspend grading services, after a hearing, for "interference with or obstruction of any employee of the Department in the performance of his duties under the regulations, by intimidation, threats, assaults, *or any other improper means.*" 13 Fed. Reg. 1275, 1278 (Mar. 10, 1948) (emphasis added). In 1959, the Secretary issued the current regulation, 7 C.F.R. § 53.13(a) (1977), whose similar but more specific language is set out above. See note 4 *supra.*

The substance of the current regulation and its predecessor, then, was adopted soon after the passage of the Act and has been in effect for about thirty years.[13] Absent "compelling indications" that the Secretary is wrong, his long-standing interpretation as to the regulation's validity is entitled to great deference. *See, e.g., Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450-51 (1978).

Further, because Congress has expressly authorized the Secretary to promulgate such rules as may be necessary to carry out the provisions of the Act, West's burden in attacking regulation 53.13(a) is especially great if the regulation is "reasonably related" to the purpose of enabling legislation. *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973); *Graham* v. *National Transportation Safety Board,* 530 F.2d 317, 319 (8th Cir.

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[13]To our knowledge, this is the first challenge to its validity. The Secretary claims that judicial decisions upholding agency withdrawal of grading services have necessarily held that the Secretary is authorized to withdraw them. The Secretary cites but one example, however, *Arrow Meat Co.* v. *Freeman,* 261 F.Supp. 622 (D.Ore. 1966). Agency jurisdiction was not challenged in *Arrow,* and we are not aware of the other judicial decisions to which the Secretary alludes.

1976). The declared intent of the Act is "to provide for * * * an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved * * *." 7 U.S.C. § 1621. More specifically, the grading activities authorized by section 1622 are designed to ensure "that consumers may be able to obtain the quality product which they desire." Applying the test stated in *Mourning* and adopted in *Graham*, the district court reasoned:

> The integrity of the federal grading program rests on its ability to provide the consuming public with accurate and honest grading of meat and meat products. Such actions as bribery of inspectors directly impair the program's ability to achieve such a goal. In promulgating § 53.13, the Secretary has, through the establishment of certain conditions under which federal meat grading services will be provided or denied, acted to protect the program from the adverse impact of such activities. This action is rationally related to the purpose of the enabling Act.

West contends that this reasoning is flawed because the Act is voluntary in nature. He argues that the exclusive sanction for abusing the grading service is the criminal penalty Congress authorized in a 1955 amendment to section 1622(h). That amendment provides for a fine of up to $1,000 and imprisonment up to one year for the knowing falsification of inspection or grading certificates. Thus, West argues that the Act authorizes only "housekeeping" regulations and that regulation 53.13(a) is void because out of harmony with the Act. *See, e.g., Manhatten General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134-35 (1936).

These arguments do not rebut the force of the district court's reasoning. The voluntary nature of the Act does not prevent the Secretary from imposing reasonable require-

ments upon the recipients of the service. We specifically so held in *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 237 (8th Cir. 1975), in which we upheld the Secretary's decision to require recipients of beef grading services to accept yield grading as a condition of receiving quality grading. The imposition of mandatory yield grading was reasonable in that it advanced the Act's goals, which included the goal of making available quality products to consumers. Regulation 53.13, designed to ensure that meat grading procedures remain honest, is, if anything, more closely connected with this statutory purpose. The inclusion of a penal sanction by Congress in 1955 for falsification of official certificates does not vitiate the agency's power to correct other abuses that threaten the integrity of the meat grading scheme. *See Jacquet* v. *Westerfield*, 569 F.2d 1339, 1345 (5th Cir. 1978). The fact that Congress has addressed a specific class of activities does not foreclose an agency, expressly empowered to make necessary rules, from addressing others. *See Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 372-73.

West argues, however, that the regulation in question goes far beyond that in *Butz*, that it asserts the "awesome power to suspend," which can be granted by Congress only by express language.[14] West relies heavily on *SEC* v.

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[14]Running parallel to this argument is West's contention that withdrawal of services for misconduct is a penal sanction, and as such can be authorized only by specific statutory language. Accepting that in this case the Secretary has no punitive authority, we nevertheless conclude that the sanction in question is not penal but remedial. Whether an administrative denial of benefits is penal turns on its purpose. *See generally, e.g.*, Clark, *Civil and Criminal Penalties and Forfeitures: A Framework of Constitutional Analysis*, 60 Minn. L. Rev. 379, 406-07, 485-86 (1976). The evident purpose of regulation 53.13(a) is not to stigmatize or punish wrongdoers; it is to prevent misconduct that would jeopardize the integrity of and public confidence in the federal product grading system. Of course, if in a particular case the sanction of withdrawal is not reasonably related to the regulation's authorized remedial purpose, that

Sloane, 436 U.S. 103 (1978), but an analysis of *Sloane* demonstrates the infirmity of his position. *Sloane* held that the Securities Exchange Commission (SEC) was not authorized by the 1934 Securities Exchange Act to issue a series of ten-day orders that suspended trading in a corporation's stock. One reason for the Court's decision was that it would not find conferred, absent an "unmistakable mandate," the "awesome power" to suspend *sumarily,* without notice, hearing, or even a statement of findings.[15] Here, of course, the Secretary is asserting only the power to withdraw services some time after a full agency hearing.[16]

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[14] (Continued)
particular application of the regulation may be struck down as punitive on review from an agency order. *See, e.g., Beck* v. *SEC,* 430 F.2d 673 (6th Cir. 1970). West cannot plausibly contend, however, that the regulation is punitive on its face.

[15]Two additional reasons for the Court's invalidation of the SEC's practice of indefinitely concatenating suspension orders were (1) the express language of the statute, which authorizes suspensions "for a period not exceeding ten days," 436 U.S. at 110-12, and (2) the inconsistency of the SEC's interpretation with other provisions in the statute, which authorize suspensions, after a hearing, for only limited periods of time. *Id.* at 112-14.

The first reason explains three of the cases on which West principally relies, *Zuber* v. *Allen,* 396 U.S. 168 (1969); *Lehigh Valley Coop* v. *United States,* 370 U.S. 76 (1962); *Brannan* v. *Stark,* 342 U.S. 451 (1952). All three cases involved administrative adjustment to minimum milk prices that ran counter to an express directive of the Agricultural Marketing Agreement Act of 1937. Here, by contrast, there is no showing that the challenged regulation is inconsistent with any express statutory mandate. The second reason, inconsistency of the challenged regulation with the statutory scheme, explains another set of cases relied upon by West. *E.g., Conway City Farmers Ass'n* v. *United States,* 588 F.2d 592, 598-99 (8th Cir. 1978); *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1040-42 (8th Cir. 1978), *aff'd,* 99 S.Ct. 1435 (1979).

[16]We intimate no view on the Secretary's authority to withdraw grading services summarily. We note that 7 C.F.R. § 2850.40 purports to grant him that authority.

West next argues that any implied authorization for withdrawal of grading services is negated by the congressional practice of authorizing the Secretary to suspend or withdraw services with express language, and with specific limits on the duration of the sanction.[17] West places special reliance on language this Court cited in *State Highway Commission* v. *Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973): " '[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.' "

This argument would be relevant if the service here in question were akin to those whose withdrawal is expressly authorized. But it is not. The other services are available to persons who must be licensed by the Secretary. Without a license they are legally forbidden to deal with third parties. With respect to meat grading services, however, "no person shall be required to use [them]." 7 U.S.C. § 1622(h). By withdrawing meat grading services the Secretary does not suspend a person's right to deal with third parties. Rather, the Secretary is acting to determine the persons with whom *he* will deal.[18] *See, e.g., Gonzalez* v.

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[17]West refers to several statutes, *e.g.*, 7 U.S.C. §§ 203, 204 (relating to Packers and Stockyards Act of 1921) (market agencies and stockyard dealers must register, registrant may be suspended, after hearing, for "reasonable specified time"); 7 U.S.C. § 246 (Warehouse Act of 1916) (suspension or revocation, after hearing, of warehouseman's license); 7 U.S.C. § 449h(a) (Perishable Commodities Act) (up to ninety days suspension, after hearing, of license of commissioner merchant, dealer, or broker, or revocation of license, after hearing, if violation "flagrant or repeated"). As the parentheticals indicate, West misreads the statutes in claiming that each congressional grant of the power to suspend contains "specific criteria" as to the "length and duration of sanction."

[18]We concede that, as a practical matter, withdrawal of meat grading services may impair one's ability to do business. We reiterate, however, that the Secretary in this case is asserting the power to withdraw only after a hearing to determine whether a suspension of meat grading services is necessary to ensure the integrity of the service.

Freeman, 334 F.2d 570 (D.C. Cir. 1964) (debarment of contractors by Secretary, after hearing, impliedly authorized, despite potential adverse economic impact on the individual involved).

Moreover, contrary to West's assertion, the Secretary's power to suspend is not unbounded. Instead, it is a power to impose sanctions, subject to judicial review, that are reasonably related to their remedial purpose. Although the Secretary's findings and choice of sanctions are entitled to due deference, they may be challenged on review as being unreasonable under the circumstances.

Our conclusion is reinforced by the closely analogous result in the recent case of *Touche Ross & Co.* v. *SEC*, *supra*, which upheld an SEC rule that permitted that agency to disbar from practice, either temporarily or permanently, any person found, after hearing, to lack the character or integrity to represent others before the SEC. Although the rule lacked express statutory authorization, it was juistified as "an attempt by the SEC essentially to protect the integrity of its own processes." *Id.* at 2581. We think much the same can be said of the Department of Agriculture here. Although West terms *Touche Ross & Co.* "wildly inapposite" because it involved licensed professionals, we think that the presence of a license in that case makes the result here follow a fortiori: if express authorization is not required to revoke or suspend a license to represent third parties before an agency, neither is it required to suspend an agency's provision of a service which is, unlike a license, not a legal prerequisite to dealing with third parties.

It may be, as the Secretary suggests, that a fair assessment of the statutory language precludes an excursion into legislative history: "when a statute on its face clearly covers certain activity, as in the instant case, we believe a court should accept the statute as written and avoid plunging into the murky waters of legislative history in an at-

tempt to fathom whether Congress really intended to reach what the language of its statute *does* reach." *United States* v. *LeFaivre,* 507 F.2d 1288, 1295 (4th Cir. 1974), *cert. denied,* 420 U.S. 1004 (1975).[19] Because we consider here a question of implied authority, however, it may be appropriate to examine the legislative history for what guidance it may give. To negate the implied authority that thus far appears, however, we would require strong evidence in the legislative history of a contrary congressional intent.

The evidence that West supplies, by contrast, is inconclusive at best. It consists of two basic items. The first is a colloquy between Senator Richard B. Russell, the floor manager of the Senate Bill that became the Agricultural Marketing Act of 1946, and Senator Robert A. Taft, the Republican leader in the Senate. We have set out the colloquy below.[20]

From this exchange West would have us conclude that the Act contemplates no withdrawal of grading service.

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[19]The district court ignored the legislative history, presumably because it found the statutory language sufficiently plain. *See TVA* v. *Hill,* 437 U.S. 153, 184 n.29 (1978).

[20]Mr. Taft. Mr. President, will the Senator yield?

Mr. Russell. I yield.

Mr. Taft. Does this Bill in any way extend the *power* of the Department of Agriculture * * * or is it strictly confined to research?

Mr. Russell. It does *not* in any wise *extend* the *power* of the Department of Agriculture or any of its subdivisions.

Mr. Taft. Either to buy or sell or *regulate* production?

Mr. Russell. *It does not to the slightest degree make any such provision.* It provides wholly for research.

Mr. Taft. *There are a couple of very general statements contained in the Bill which I had not read with care,* so I could not judge whether the language was sufficiently broad to cover other activities.

Mr. Russell. *It is strictly a research Bill.*

92 Congressional Record, part 8, 79th Cong., 2d Sess. at 10,370 et seq. (July 29, 1946). We have retained the emphases supplied by West.

While as a logical matter the inference West urges is a permissible one, it is but one of several permissible inferences, and is by no means inevitable. We are mindful that "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945). Senator Russell's assurance that the Act would not "extend the power" of the Department of Agriculture and that it was "strictly a research bill" must be read against the plain language of section 1622(h), which expressly authorizes the Secretary to certify the grade of agricultural products. Perhaps Senator Russell thought the Secretary already had this power, since federal grading services had been available continuously since the 1920's. *See* 7 U.S.C.S. § 414 (repealed by 1955 amendment to section 1622 (h)) and appropriation acts cited therein. Senator Russell's assurance that the Act would not "regulate production" may have meant simply that the Act would not regulate production directly, as it does, for example, the Agricultural Marketing Agreement Act of 1937. Or perhaps Senator Russell was alluding to the voluntary nature of the Act; an act that provides a service only to those who want it is ordinarily not considered regulatory in nature. Of course, these speculations cannot be the basis for judicial holding. But neither can we rely on the speculations of West, when the language of the statute indicates a contrary result. We find the colloquy inconclusive.

The remainder of the 1946 legislative history only reinforces the Secretary's view. At hearings before the House Committee on Agriculture, which was considering the bill that would become the Act, the Secretary's administrators in the Production and Marketing Administration attested to the important consumer interest in "disinterested inspection and grade certification." Hearings on H.R. 6548 and H.R. 6692 Before The Committee on Agriculture of the

House of Representatives, 79th Cong., 2d Sess. 145, 146, 185 (1946). Moreover, at the time of the Act, the Secretary had issued regulations that permitted him to refuse the grading service, authorized by appropriations acts, to persons whose misconduct jeopardized the integrity of the service. 1 Fed. Reg. 2126, 2127 (1936). Although congressional acquiesence by silence is not to be lightly presumed, *e.g., TVA* v. *Hill, supra; SEC* v. *Sloane, supra,* we think it sufficient in this case to remove any last vestige of doubt concerning the scope of the Act's grant of power.

West's second argument from legislative history focuses on the background to the 1955 amendment to section 1622(h), which provided criminal sanctions for falsifying official Department of Agricultural grading inspection certificates. West's argument is that the Secretary cannot be said to have power to withdraw services because Congress, in passing the 1955 amendment, specifically rejected a proposal that would have imposed criminal penalties for violations of the Secretary's regulations.

We reject this argument for three reasons. First, the proposed bill to which West refers would have criminally proscribed the violation of only those regulations that governed the possession or use of inspection certificates.[21] A bill that rejects criminal penalties for violations of regulations that govern a narrow class of activities does not impliedly reject administrative efforts to address other activities. Second, even had Congress rejected a broad proposal to impose criminal sanctions on violations of *any* of the Secretary's regulations under the Act, the rejection of judicially imposed sanctions does not mean that Congress

[21]The bill would have imposed penal sanctions on any person who violated "any provision of any regulation promulgated by the Secretary of Agriculture to govern the possession or use of certificates, memorandums, marks, or other identifications with respect to inspection, class, grade, quality, size, quantity or condition or devices for making such marks or identifications, issued or authorized under this Act."

rejected the agency's power to correct abuses with less stringent means.

Finally, even had West been able to demonstrate some ambiguity as to the meaning of the statute, we would find considerable strength in the Secretary's argument that the legislative history of the 1955 amendment, far from negating the Secretary's power to ensure the integrity of meat grading through justified withdrawals, actually indicates that Congress approved of the practice. In 1955 the Secretary's regulation 53.12, which authorized withdrawal of grading services for misconduct, had been in place for about eight years. The Deputy Administractor for Marketing Services, who explained to the House Committee on Agriculture the purpose for the proposed criminal sanction, gave the Committee

> a specific illustration. It is happening frequently with respect to the grading of meat. Federal meat grading has become an extremely important industry of merchandising, with the result that we are finding too frequently people or firms who are developing fictitious rollers and rolling that meat, implying that it has been officially graded. If we were servicing a firm under the Inspection Service and found them doing that, we could naturally withdraw any privileges of further use of this Service to them.
>
> In that respect we can take care of that but we find too many instances where this type of activity is growing on the part of people who do not use the Service and our hands are tied with respect to imposing any penalties upon them.

Hearings on S. 1757 before the Committee on Agriculture of the House of Representatives, 84th Cong., 1st Sess. at 47-48 (1955). Although this statement could not be accorded much significance if the Secretary's withdrawal power were at odds with the statutory language or the general pattern of the statute, *SEC* v. *Sloane, supra,* 436 U.S. at 121, such is not the case here. In the present case,

we think that the prior existence of the regulation and the Department of Agriculture's assertion of the validity of that regulation in a congressional hearing on a related amendment triggers the presumption that Congress was generally aware of the Secretary's asserted withdrawal power. *See* cases cited *id.* at 120.

In summary, we uphold regulation 53.13(a), which permits the Secretary to withdraw grading services for misconduct in order to ensure the integrity of the grading service. The Secretary's interpretation of his power to enforce the substance of 53.13(a) has been followed, unchallenged, for at least thirty years. Moreover, the regulation was issued pursuant to express rule making authority and is reasonably designed to preserve the integrity and reliability of the grading system the Secretary is directed and authorized to administer. Thus, although not expressly authorized, the regulation enjoys an especially strong presumption of validity which West has not rebutted. The regulation is not inconsistent either with an express statutory provision or with the agriculture laws taken as a whole. Finally, the legislative history tends to support rather than strongly oppose the view that the regulations are authorized by Congress.

We therefore affirm the district court in its denial of injunctive relief.

ROSS, Circuit Judge, concurring.

I concur in the opinion of Judge Stephenson. However, in my opinion the regulations should provide that a limit be placed upon the length of time that the penalties will be enforced, or at least set forth some guidelines which would give the Secretary authority to refuse to impose a time limit under specified conditions.

A true copy.
Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[APPENDIX]

[Filed August 2, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANK R. WEST, Plaintiff, vs BOB BERGLAND, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, and DONALD HOUSTON, ACTING ADMINISTRATOR OF THE FOOD SAFETY AND QUALITY SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	)	CIVIL No. 79-0-60 MEMORANDUM

APPEARANCES: For Plaintiff — James P. Linn and B. J. Rothbaum, Jr., Oklahoma City, Okla.

David S. Lathrop, Omaha, Nebraska

For Defendants — Marshall M. Marcus and Helen C. Harris, Washington, D. C.

Thomas D. Thalken, Asst. U. S. Attorney District of Nebraska

DENNEY, District Judge

On February 13, 1979, Frank R. West filed a complaint in this Court to prevent the initiation of an administrative hearing to determine whether the benefits of meat grading and acceptances services should be withdrawn from him. A temporary restraining order was executed by this Court

on that same day. Exhaustive briefs were submitted and oral argument was heard on the issue of whether a permanent injunction against administrative action by the Department of Agriculture should issue. After reviewing the statutes, regulations and legislative history, the Court believes that the application for permanent equitable relief should be denied, and that the temporary restraining order should be dissolved. The following findings of fact and conclusions of law demonstrate the propriety of this holding.

The Agricultural Marketing Act of 1946 [the Act] was enacted by Congress to provide for ongoing research into basic laws and principles relating to agriculture and to improve and facilitate the marketing and distribution of agricultural products. 7 U.S.C.A. § 1621 *et seq.* (1973). The Act specifically directs the Secretary of Agriculture to engage in the following tasks:

> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. 7 U.S.C.A. § 1622(h) (1973):

Further authority for the enactment of regulations for the purpose of achieving the purposes of the Act can be found in 7 U.S.C.A. § 1624(b) (1973):

> The Secretary of Agriculture shall promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter.

The Court believes that Congress, in its passage of these two statutes, delegated broad authority to U.S.D.A. to devise rational methods to achieve the statutory purposes.

The plaintiff contends that 7 C.F.R. § 53.13 (1979) was promulgated without statutory authorization and is void as a result. The regulation at issue provides for the denial or withdrawal of voluntary grading and acceptance services under the Act for misconduct by individuals receiving such services.

Where, as here, there is a broad, general grant of rule-making authority, the standard of review for ascertaining whether a particular regulation is valid is well settled. As the Supreme Court stated in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973):

> The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268, 280-281 (1969). See also *American Trucking Assns.* v. *United States*, 344 U.S. 298 (1953).

This standard has been adopted in the Eighth Circuit. *Graham* v. *National Transportation Safety Board*, 530 F.2d 317 (8th Cir. 1976); *Dealer's Transport Co.* v. *Werner Transportation Co.*, 203 F.2d 549 (8th Cir. 1953).

The Court believes that 7 C.F.R. § 53.13 (1979) is reasonably related to the purposes of the Act. The integrity of the federal grading program rests on its ability to provide the consuming public with accurate and honest grading of meat and meat products. Such actions as brib-

ery of inspectors directly impair the program's ability to achieve such a goal. In promulgating § 53.13, the Secretary has, through the establishment of certain conditions under which federal meat grading services will be provided or denied, acted to protect the program from the adverse impact of such activities. This action is rationally related to the purposes of the enabling Act.

The lack of express authorization from Congress providing for the denial or withdrawal of meat grading services does not alter this conclusion. As the Supreme Court stated in *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 309-10 (1953) with regard to I.C.C. regulation of equipment leasing practices:

> Here, appellants have framed their position as a broadside attack on the Commission's asserted power. All urge upon us the fact that nowhere in the Act is there an expressed delegation of power to control, regulate, or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress does not exist. (Citations omitted). Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

Nor does the Court agree that a regulation denying or withdrawing meat grading services is "punitive" or "quasi-penal", and therefore requires express authorization. Administrative sanctions of the nature involved here are remedial rather than penal in nature. *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). The denial or withdrawal of meat grading services are actions that could be taken to protect the integrity of the grading process. They act as "deterrence rather than retribution." Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH.L.REV. 58, 85 (1943). It is a necessary incident of regulation that agencies have the ability to take action to deter others from violating laws that they administer. *See Beck* v. *S.E.C.*, 430 F.2d 673 (6th Cir. 1970).

The inclusion of a penal sanction in 7 U.S.C.A. § 1622(h) (1973) by Congress in 1955 does not change the character of the regulatory scheme. The fact that Congress has taken action to render a narrow range of activities criminal does not cut off an agency's power to impose requirements on other ranges of activity. *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 372-73.

Relevant to this issue is the rule that an agency's interpretation of the statutes it administers is entitled to deference, and may not be overturned unless the interpretation flouts a clear statutory command or is otherwise utterly unreasonable. There must be "compelling indications" that the agency is wrong. *Zenith Radio Corp.* v. *United States*, 46 U.S.L.W. 4752, 4754 (June 21, 1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The agency's interpretation is entitled to particular deference where, as here, it is longstanding and has been consistently followed since the enactment of the statute. *Kennth* v. *Schmoll*, 482 F.2d 90, 95 (10th Cir. 1973).

Nor does West have any absolute statutory right to avail himself of federal meat grading and acceptance services. Illustrative is the holding in *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964), a case involving debarment

procedures by the U.S.D.A.'s Commodity Credit Corporation where the enabling statute did not specifically authorize debarment. The *Gonzalez* court held as follows:

> Congress had made no explicit provision for debarring contractors doing business with Commodity Credit. The question presented is whether Commodity Credit is powerless to terminate business relations with irresponsible defaulting or dishonest contractors. Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary "means for accomplishing the congressional purpose" of Commodity Credit to "aid in the development of foreign markets for agricultural commodities." Without such power to deal with irresponsible bidders and contractors, the efficiency of Commodity Credit's operations would be severely impaired. We conclude that such a power is inherent and necessarily incidental to the effective administration of the statutory scheme. (Citations omitted). *Gonzalez* v. *Freeman, supra,* 334 F.2d at 576-77.

The Court believes that an analogy may be appropriately drawn between debarment and withdrawal of meat grading services. The power to establish a certain entitlement necessarily contemplates the existence of the power to discipline in the face of certain conduct. It is an implied power which exists as a corollary to the general grant of authority.

Moreover, West's due process rights are not offended by the requirement of facing a trial-type hearing before an Administrative Law Judge. He will have every opportunity to defend himself in an administrative setting. The right to appeal the U.S.D.A.'s ultimate decision, if adverse, is available to the plaintiff. The Court shall require West to exhaust his administrative remedies.

An order has been filed contemporaneously herewith in accordance with this Memorandum Opinion.

Dated this 1st day of August, 1979.

[Filed February 14, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANK R. WEST, Plaintiff, vs	)	CIVIL NO. 79-0-60
BOB BERGLAND, Secretary of Agriculture of the United States of America, et al., Defendants.	)	ORDER

This matter comes before the Court upon the plaintiff's motion for a temporary restraining order.

After considering the arguments of counsel and reviewing the applicable law, the Court believes that a sufficient showing has been made to warrant the issuance of a temporary restraining order.

IT IS HEREBY ORDERED that the defendants, their agents and employees, shall be enjoined from further prosecution of the administrative proceedings before the Department of Agriculture regarding the withdrawal of federal meat inspection and grading services from the plaintiff, and all entities with which he is connected, until 9:30 A.M., on the 23rd day of February, 1979. No bond shall be required.

IT IS FURTHER ORDERED that a hearing upon the application for a preliminary injunction shall commence at 9:30 A.M., on February 23, 1979, in Court Room No. 2, United States Post Office & Court House, Omaha, Nebraska.

Dated this 14th day of February, 1979, at 10:30 a.m.

BY THE COURT

(s) *Robert V. Denney*
Robert V. Denney
United States District Judge

APPENDIX B

AGRICULTURAL MARKETING ACT OF 1946

7 U.S.C. § 1621. *Congressional declaration of purpose; use of existing facilities; cooperation with States*

The Congress declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote through research, study, experimentation, and through cooperation among Federal and State agencies, farm organizations, and private industry a scientific approach to the problems of marketing, transportation, and distribution of agricultural products similar to the scientific methods which have been utilized so successfully during the past eighty-four years in connection with the production of agricultural products so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and marketing programs to improve the distribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be

improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. In effectuating the purposes of this chapter, maximum use shall be made of existing research facilities owned or controlled by the Federal Government or by State agricultural experiment stations and of the facilities of the Federal and State extension services. To the maximum extent practicable marketing research work done under this chapter in cooperation with the States shall be done in cooperation with the State agricultural experiment stations; marketing educational and demonstrational work done under this chapter in cooperation with the States shall be done in cooperation with the State agricultural extension service; market information, inspection, regulatory work and other marketing service done under this chapter in cooperation with the State agencies shall be done in cooperation with the State departments of agriculture, and State bureaus and departments of markets.

---

7 U.S.C. § 1622. *Duties of Secretary relating to agricultural products*

The Secretary of Agriculture is directed and authorized:

Determination of methods of processing, packaging, marketing, etc.; publication of results

(a) to conduct, assist, and foster research, investigation, and experimentation to determine the best methods of processing, preparation for market, packaging, handling, transporting, storing, distributing, and marketing agricultural products: *Provided*, That the results of such research shall be made available to the public for the purpose of expanding the use of American agricultural products in such manner as the Secretary of Agriculture may determine.

Determination of costs

(b) to determine costs of marketing agricultural products in their various forms and through the various channels and to foster and assist in the development and establishment of more efficient marketing methods (including analyses of methods and proposed methods), practices, and facilities, for the purpose of bringing about more efficient and orderly marketing, and reducing the price spread between the producer and the consumer.

Improvement of standards of quality, condition, etc.; standard of quality for ice cream

(c) To develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices. Within thirty days after September 29, 1977, the Secretary shall by regulation adopt a standard of quality for ice cream which shall provide that ice cream shall contain at least 1.6 pounds of total solids to the gallon, weigh not less than 4.5 pounds to the gallon and contain not less than 20 percent total milk solids, constituted of not less than 10 percent milkfat. In no case shall the content of milk solids not fat be less than 6 percent. Whey shall not, by weight, be more than 25 percent of the milk solids not fat. Only those products which meet the standard issued by the Secretary may bear a symbol thereon indicating that they meet the Department of Agriculture standard for "ice cream."

Elimination of artificial barriers to free movement

(d) To conduct, assist, foster, and direct studies and informational programs, designed to eliminate artificial barriers to the free movement of agricultural products.

Development of new markets

(e) To foster and assist in the development of new or expanded markets (domestic and foreign) and new and expanded uses and in the moving of larger quanties of ag-

ricultural products through the private marketing system to consumers in the United States and abroad.

Increasing consumer edumation

(f) To conduct and cooperate in consumer education for the more effective utilization and greater consumption of agricultural products: *Provided,* That no money appropriated under the authority of this chapter shall be used to pay for newspaper or periodical advertising space or radio time in carrying out the purposes of this section and subsection (e) of this section.

Collection and dissemination of marketing information

(g) To collect and disseminate marketing information, including adequate outlook information on a market-area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and bringing about a balance between production and utilization of agricultural products.

Inspection and certification of products in interstate commerce; certificates as evidence; penalties

(h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. Any official certificate issued under the authority of this subsection shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the statements therein contained. Whoever knowingly shall falsely make, issue, alter, forge, or counter-

feit any official certificate, memorandum, mark, or other identification, or device for making such mark or identification, with respect to inspection, class, grade, quality, size, quantity, or condition, issued or authorized under this section or knowingly cause or procure, or aid, assist in, or be a party to, such false making, issuing, altering, forging, or counterfeiting, or whoever knowingly shall possess, without promptly notifying the Secretary of Agriculture or his representative, utter, publish, or use as true, or cause to be uttered, published, or used as true, any such falsely made, altered, forged, or counterfeited official certificate, memorandum, mark, identification, or device, or whoever knowingly represents that an agricultural product has been officially inspected or graded (by an authorized inspector or grader) under the authority of this section when such commodity has in fact not been so graded or inspected shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Development of facilities for assembling, processing, transporting, etc.

(i) To determine the needs and develop or assist in the development of plans for efficient facilities and methods of operating such facilities for the proper assembly, processing, transportation, storage, distribution, and handling of agricultural products.

Improvement of transportation facilities and rates

(j) To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, or other Federal or State transportation regulatory body with respect to rates, charges, tariffs, practices, and services, or by working directly with individual carriers or groups of carriers.

Collection and dissemination of marketing statistics

(k) To collect, tabulate, and disseminate statistics on marketing agricultural products, including, but not restricted to statistics on market supplies, storage stocks, quantity, quality, and condition of such products in various positions in the marketing channel, utilization of such products, and shipments and unloads thereof.

Development of procurement standards and specifications

(l) To develop and promulgate, for the use and at the request of any Federal agency or State, procurement standards and specifications for agricultural products, and submit such standards and specifications to such agency or State for use or adoption for procurement purposes.

Promotion of research for handling, storing, preserving, etc.

(m) To conduct, assist, encourage, and promote research, investigation, and experimentation to determine the most efficient and practical means, methods, and processes for the handling, storing, preserving, protecting, processing, and distributing of agricultural commodities to the end that such commodities may be marketed in an orderly manner and to the best interest of the producers thereof.

General research, services, and activities

(n) To conduct such other research and services and to perform such other activities as will facilitate the marketing, distribution, processing, and utilization of agricultural products through commercial channels.

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7 U.S.C. § 1623. *Appropriations; allotments to States*

(a) In order to conduct research and service work in connection with the preparation for market, processing, packaging, handling, storing, transportation, distributing, and marketing of agricultural products as authorized by

this chapter, there is hereby authorized to be appropriated the following sums:

(1) $2,500,000 for the fiscal year ending June 30, 1947, and each subsequent fiscal year.

(2) An additional $2,500,000 for the fiscal year ending June 30, 1948, and each subsequent fiscal year.

(3) An additional $5,000,000 for the fiscal year ending June 30, 1949, and each subsequent fiscal year.

(4) An additional $5,000,000 for the fiscal year ending June 30, 1950, and each subsequent fiscal year.

(5) An additional $5,000,000 for the fiscal year ending June 30, 1951, and each subsequent fiscal year.

(6) In addition to the foregoing, such additional funds beginning with the fiscal year ending June 30, 1952, and thereafter, as the Congress may deem necessary.

Such sums appropriated in pursuance of this chapter shall be in addition to, and not in substitution for, sums appropriated or otherwise made available to the Department of Agriculture.

(b) The Secretary of Agriculture is authorized to make available from such funds such sums as he may deem appropriate for allotment to State departments of agriculture, State bureaus and departments of markets, State agricultural experiment stations, and other appropriate State agencies for cooperative projects in marketing service and in marketing research to effectuate the purposes of this chapter: *Provided,* That no such allotment and no payment under any such allotment shall be made for any fiscal year to any State agency in excess of the amount which such State agency makes available out of its own funds for such research. The funds which State agencies are required to make available in order to qualify for such an allotment shall be in addition to any funds now avaiable to such

agencies for marketing services and for marketing research. The allotments authorized under this section shall be made to the agency or agencies best equipped and qualified to conduct the specific project to be undertaken. Such allotments shall be covered by cooperative agreements between the Secretary of Agriculture and the cooperating agency and shall include appropriate provisions for preventing duplication or overlapping of work within the State or States cooperating. Should duplication or overlapping occur subsequent to approval of a cooperative project or allotment of funds, the Secretary of Agriculture is authorized and directed to withhold unexpended balances on such projects notwithstanding the prior approval thereof.

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7 U.S.C. § 1623a. *Minimum sum for contracting*

Not less than $1,500,000 of the appropriations of the Department for research and service work authorized by this chapter and sections 427 and 427i(e) of this title, and sections 1891 to 1893 of Title 42, shall be available for contracting in accordance with this chapter and sections 427 and 427i(e) of this title, and sections 1891 to 1893 of Title 42.

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7 U.S.C. § 1624. *Cooperation with Government and State agencies, private research organizations, etc.; rules and regulations*

(a) In carrying out the provisions of this chapter, the Secretary of Agriculture may cooperate with other branches of the Government, State agencies, private research organizations, purchasing and consuming organizations, boards of trade, chambers of commerce, other associations of business or trade organizations, transportation and storage agencies and organizations, or other persons or corporations engaged in the production, transportation, storing, processing, marketing, and distribution of agricultural products whether

operating in one or more jurisdictions. The Secretary of Agriculture shall have authority to enter into contracts and agreements under the terms of regulations promulgated by him with States and agencies of States, private firms, institutions, and individuals for the purpose of conducting research and service work, making and compiling reports and surveys, and carrying out other functions relating thereto when in his judgment the services or functions to be performed will be carried out more effectively, more rapidly, or at less cost than if performed by the Department of Agriculture. Contracts under this section may be made for work to be performed within a period not more than four years from the date of any such contract, and advance, progress, or other payments may be made. The provisions of section 529 of Title 31 and section 5 of Title 41 shall not be applicable to contracts or agreements made under the authority of this section. Any unexpended balances of appropriations obligated by contracts as authorized by this section may, notwithstanding the provisions of section 713 of Title 31, remain upon the books of the Treasury for not more than five fiscal years before being carried to the surplus fund and covered into the Treasury. Any contract made pursuant to this section shall contain requirements making the result of such research and investigations available to the public by such means as the Secretary of Agriculture shall determine.

(b) The Secretary of Agriculture shall promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter.

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7 U.S.C. § 1625. *Transfer and consolidation of functions, powers, bureaus, etc.*

In order to facilitate administration and to increase the effectiveness of the marketing research, service, and regulatory work of the Department of Agriculture to the fullest extent practicable, the Secretary of Agriculture is author-

ized, notwithstanding any other provisions of law, to transfer, group, coordinate, and consolidate the functions, powers, duties, and authorities of each and every agency, division, bureau, service, section, or other administrative unit in the Department of Agriculture primarily concerned with research, service, or regulatory activities in connection with the marketing, transporation, storage, processing, distribution of, or service or regulatory activities in connection with, the utilization of, agricultural products, into a single administrative agency. In making such changes as may be necessary to carry out effectively the purposes of this chapter, the records, property, personnel, and funds of such agencies, divisions, bureaus, services, sections, or other administrative units in the Department of Agriculture affected are authorized to be transferred to and used by such administrative agency to which the transfer may be made, but such unexpended balances of appropriations so transferred shall be used only for the purposes for which such appropriations were made.

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7 U.S.C. § 1623. *Definitions*

When used in this chapter, the term "agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock and poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured product thereof, and the term "State" when used in this chapter shall include the Virgin Islands and Guam.

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7 U.S.C. § 1627. *Appointment of personnel; compensation; employment of specialists*

The Secretary of Agriculture shall have the power to appoint, remove, and fix, in accordance with existing law, the compensation of such officers and employees, and to

make such expenditures as he deems necessary, including expenditures for rent outside the District of Columbia, travel, supplies, books, equipment, and such other expenditures as may be necessary to the administration of this chapter: *Provided,* That the Secretary of Agriculture may appoint and fix the compensation of any technically qualified person, firm, or organization by contract or otherwise on a temporary basis and for a term not to exceed six months in any fiscal year to perform research, inspection, classification, technical, or other special services, without regard to the civil-service laws.

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7 U.S.C. § 1628. *Repealed. Pub.L. 93-86, § 2, Aug. 10, 1973, 87 Stat. 246.*

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7 U.S.C. § 1629. *Establishment of committees to assist in research and service programs*

In the furtherance of the research and service work authorized by sections 427 and 427h to 427j of this title and this chapter, the Secretary of Agriculture may, in addition to the national advisory committee, establish appropriate committees, including representatives of producers, industry, government, and science, to assist in effectuating specific research and service programs.

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7 U.S.C. § 1630. *Availability of appropriations for committee expenses in effectuating research and service work* [repealed]

APPENDIX C

TEXT OF 7 C.F.R. 52.13(a)
[Newly redesignated at 7 C.F.R. § 2853.11(a)]

Denial or withdrawal of service.

(a) *For misconduct* — (1) *Bases for denial or withdrawal.* An application or a request for service may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, any person who, or whose employee or agent in the scope of his employment or agency, (i) has wilfully made any misrepresentation or has committed any other fraudulent or deceptive practice in connection with any application or request for service under the regulations; (ii) has given or attempted to give, as a loan or for any other purpose, any money, favor, or other thing of value, to any employee of the Department authorized to perform any function under the regulations; (iii) has interfered with or obstructed, or attempted to interfere with or to obstruct, any employee of the Department in the performance of his duties under the regulations by intimidation, threats, assaults, abuse or any other improper means; (iv) has knowingly falsely made, issued, altered, forged, or counterfeited any official certificate, memorandum, mark, or other identification, or device for making any such mark or identification; (v) has knowlingly uttered, published, or used as true any such falsely made, issued, altered, forged, or counterfeited certificate, memorandum, mark, identification, or device; (vi) has knowingly obtained or retained possession of any such falsely made, issued, altered, forged, or counterfeited certificate, memorandum, mark, identification, or device, or of any such official device, or of any product bearing any such falsely made, issued, altered, forged or counterfeited mark or identification, or of any carcass or wholesale or retail cut bearing any designation specified in subdivision (vii) of this subparagraph which has not been federally graded or derived from a carcass graded as being of the indicated grade:

(vii) has applied the designation "Prime," "Choice," "Good," "Standard," "Commercial," "Utility," "Cutter," "Canner," "Cull," "Medium," 'No. 1," "No. 2," "No. 3," "No. 4," "yield Grade 1," "yield, Grade 2," "yield, Grade 3," "yield, Grade 4," or "yield, Grade 5" by stamp, or brand directly on any carcass, as part of a grade designation; or (viii) has applied to immediate containers or shipping containers of carcasses, wholesale cuts, or retail cuts, grade designations specified in paragraph (a) (1) (vii) of this section, when such carcasses, wholesale cuts, or retail cuts contained therein have not been federally graded; or (ix) has in any manner not specified in this paragraph violated subsection 203 (h) of the Act: *Provided*, That paragraph (a) (1) (vi) of this section shall not be deemed to be violated if the person in possession of any item mentioned therein notifies the Director or chief without delay that he has possession of such item and, in the case of an official device, surrenders it to the Chief, and, in the case of any other item, surrenders it to the Director or Chief or destroys it or brings it into compliance with the regulations by obliterating or removing the violative features under supervision of the Director or Chief: *And provided, further,* That paragraph (a) (1) (ii) through (viii) of this section shall not be deemed to be violated by any act committed by any person prior to the making of an application for service under the regulations by the principal person. An application or a request for service may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, any person who operates an establishment for which he has made application for service if, with the knowledge of such operator, any other person conducting any operations in such establishment has committed any of the offenses specified in paragraph (a) (1) (i) through (ix) of this section after such application was made. Moreover, an application or a request for service made in the name of a person otherwise eligible for service under the regulations may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, such a prson (a) in case the service is

or would be performed at an establishment operated (1) by a corporation, partnership, or other person from whom the benefits of the service are currently being withheld under this paragraph, or (2) by a corporation, partnership, or other person having an officer, director, partner, or substantial innvestor from whom the benefits of the service are currently being withheld and who has any authority with respect to the establishment where service is or would be performed, or (b) in case the service is or would be performed with respect to any livestock or product in which any corporation, partnership, or other person within paragraph (a)(1)(ix)(*a*)(*1*) of this section has a contract or other financial interest.

(2) *Procedure.* All cases arising under this paragraph shall be conducted in accordance with the rules of practice governing withdrawal of inspection and grading service under the Agricultural Marketing Act of 1946 as contained in Part 50 of this chapter.

(b) *For miscellaneous reasons.* An application or a request for service may be rejected, or the benefits of the service may be otherwise denied to, or withdrawn from, any person, without a hearing, by the official in charge of the appropriate office of grading, with the concurrence of the Director or Chief (1) for administrative reasons such as the nonavailability of personnel to perform the service; (2) for the failure to pay for service; (3) in case the application or request relates to livestock or products which are not eligible for service under §53.5, or which are unclean or are in an unclean establishment; (4) for other noncompliance with the conditions on which service is available as provided in the regulations, except matters covered by paragraph (a) of this section; or (5) in case the person is a partnership, corporation, or other person from whom the benefits of the service are currently being withheld under paragraph (a) of this section. Notice of such denial or withdrawal, and the reasons therefor, shall promptly be given to the person involved.

(c) *Filing of records.* The final orders in formal proceedings under paragraph (a) of this section to deny or withdraw the service under the regulations (except orders required for good cause to be held confidential and not cited as precedents) and other records in such proceedings (except those required for good cause to be held confidential) shall be filed with the Hearing Clerk and shall be available for inspection by persons having a proper interest therein.

APPENDIX D

[Filed January 14, 1980]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1711. September Term, 1979

Frank R. West, Appellant, vs. Bob Bergland, etc., et al., Appellees.	)	Appeal from the United States District Court for the District of Nebraska.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 14 ,1980

Supreme Court, U. S.
FILED
JUN 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1592

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK R. WEST, PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1592

FRANK R. WEST, PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-26) is reported at 611 F. 2d 710. The opinion of the district court (Pet. App. A-27 to A-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1979. A petition for rehearing was denied on January 14, 1980. The petition for a writ of certiorari was filed on April 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is required to exhaust his administrative remedies before seeking judicial review.

2. Whether the Secretary of Agriculture has authority to withdraw meat grading services from persons who are found, after a hearing, to have committed acts that undermine the integrity of the Secretary's grading program.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions appear at Pet. Apps. B and C.

STATEMENT

1. The Agricultural Marketing Act of 1946 provides for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities." 7 U.S.C. 1621. It authorizes the Secretary "[t]o inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as [he] may prescribe." 7 U.S.C. 1622(h). The Act also empowers the Secretary to "promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter." 7 U.S.C. 1624(b).

Pursuant to these provisions, the Secretary administers a program for grading animal carcasses according to the quality and quantity of the meat.[1] The Secretary's regulations state that he will (1) extend grading services to any qualified person upon application and (2) withdraw services from any person whose conduct undermines the

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[1]The quality classifications for fresh meat are prime, choice, good, standard, commercial, utility, cutter, canner, and cull. 7 C.F.R. Part 2853, Subpart B. The quantity classifications include No. 1, No. 2, No. 3, No. 4, yield grade 1, yield grade 2, yield grade 3, yield grade 4, and yield grade 5. *Ibid.*

integrity of the grading program. 7 C.F.R. 2853.6 and 2853.11.[2] The regulations define the types of actions that can lead to the withdrawal of grading services to include fraud, bribery, intimidation and counterfeiting of official marks and labels. 7 C.F.R. 2853.11.

The Secretary's regulations expressly provide for a trial-type hearing before deprivation of grading services can occur. 7 C.F.R. 2853.11 and 7 C.F.R. Part 2850, Subpart C. Based upon evidence presented at such a hearing, an administrative law judge is empowered to decide whether grading services should be withdrawn and, if so, how long the withdrawal period should last. His decision is subject to review by a judicial officer within the agency and the judicial officer's decision is subject to review by the federal district court. Even if this administrative process results in the withdrawal of grading services, the person subject to the Secretary's order does not lose his ability to engage in his chosen profession. No one need receive the Secretary's grading services in order to sell meat in interstate commerce. 7 U.S.C. 1622(h).

Regulations authorizing the withdrawal of meat grading services have been in effect since 1936. 1 Fed. Reg. 2126, 2129 (1936).[3] When Congress passed the

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[2]During the pendency of this lawsuit, the Department of Agriculture recodified its regulations. This brief uses the current citations. The opinions below refer to the 1977 edition of the Code of Federal Regulations.

[3]Between 1925 and 1946, the Secretary furnished grading services in accordance with specific directives contained in annual appropriations acts for the Department of Agriculture. See 43 Stat. 844 (1925); 44 Stat. 523 (1926); 44 Stat. 998 (1927); 45 Stat. 561 (1928); 45 Stat. 1212 (1929); 46 Stat. 418 (1930); 46 Stat. 1268 (1931); 47 Stat. 637 (1932); 47 Stat. 1459 (1933); 48 Stat. 493 (1934); 49 Stat. 275 (1935); 49 Stat. 1450 (1936); 50 Stat. 425 (1937); 52 Stat. 740 (1938); 53 Stat. 968 (1939); 54 Stat. 555 (1940); 55 Stat. 431 (1941); 56 Stat. 687 (1942); 57 Stat. 421 (1943); 58 Stat. 453 (1944); 59 Stat. 158

Agricultural Marketing Act of 1946, the Secretary promulgated the regulations involved in the present case pursuant to the new statute. 13 Fed. Reg. 1275, 1278 (1948). Petitioner is the first person in 40 years who has challenged the Secretary's authority to withdraw grading services from persons whose conduct threatens the reliability of the grading program as a whole.

2. Petitioner served as president and chairman of the board of directors of the nation's second largest beef packing house from 1965 to 1976. During that period, he encouraged his employees to bribe federal inspectors to obtain favorable grading services. In January 1977, petitioner pleaded guilty to the charge of conspiring to misbrand meat to be transported in interstate commerce (Pet. App. A-2). At a hearing to determine the voluntariness of his guilty plea, petitioner admitted:

> When I was president of [American Beef Packers, Inc.] we always attempted to have our plants run efficiently and obtain the most favorable meat grading possible. I directed ABP employees to take whatever action was required to obtain these two goals. One thing that was necessary was to give gifts and other gratuities to federal meat graders. This was done by ABP employees and I was aware of it being done.[4]

Following petitioner's guilty plea and conviction, the Department of Agriculture instituted proceedings to withdraw grading services. The administrative complaint

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(1945); 60 Stat. 290 (1946). The Secretary promulgated the 1936 regulations authorizing the withdrawal of grading services pursuant to this statutory authority.

[4] *United States* v. *West*, CR 75-0-86 (D. Neb. Jan. 14, 1977), Tr. 7.

alleged that petitioner knowingly engaged in bribery of a federal meat grader and stated that the Department was seeking withdrawal "for a period of time necessary to insure the integrity of the Meat Grading and Acceptance Service, and such additional time as may be required until [petitioner] can prove to the Service that [he] will not in the future violate the Agricultural Marketing Act [and its implementing regulations]" (Pet. App. A-2 to A-3). Petitioner was advised that he could file a formal answer to the complaint and request a hearing.

Instead of presenting his defense in the prescribed administrative forum, petitioner sought injunctive relief against the Secretary on three occasions in the United States District Court for the District of Nebraska. On each occasion, the district court denied injunctive relief.[5] Nonetheless petitioner's lawsuits have significantly delayed the issuance of a final agency order. Nearly three years have passed since the filing of the administrative complaint and no hearing has yet been held. In the absence of a final order, petitioner can continue to receive grading services (Pet. App. A-3).

Following the district court's denial of injunctive relief (Pet. App. A-27 to A-33), the court of appeals affirmed

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[5]Petitioner initially alleged that the institution of agency proceedings would violate the terms of his plea agreement. The district court rejected this contention. *West* v. *United States Department of Agriculture*, Civ. No. 77-0-374 (D. Neb. Jan. 25, 1978). He then sought to intervene in a Chapter XI reorganization proceeding involving his bankrupt company to avail himself of a protective order barring collateral proceedings against the bankrupt. The district court affirmed the bankruptcy judge's denial of intervention. *In re American Beef Packers*, BK 75-0-17 (D. Neb. Sept. 6, 1978). Petitioner then filed the instant suit, alleging that the Secretary lacks statutory authority to proceed against him. The district court rejected this contention and directed petitioner to exhaust his administrative remedies (Pet. App. A-27 to A32).

(*id.* at A-1 to A-26). The court concluded that petitioner need not exhaust his administrative remedies and considered petitioner's challenge to the Secretary's regulations on the merits. The court held that the Agricultural Marketing Act of 1946 gives the Secretary rule-making power and that the Secretary's regulations governing the withdrawal of grading services are reasonably adapted to implement the provisions of the statute (*id.* at A-15 to A-26).

ARGUMENT

Review by this Court of petitioner's claims is unwarranted at this time because petitioner has failed to exhaust his administrative remedies. No administrative hearing has yet been held and the results of such a hearing cannot now be predicted. In any event, the decision of the court of appeals is correct and does not conflict with any decision rendered by this Court or any other court of appeals. Further review is therefore unnecessary.

1. This Court's decisions establish that litigants must exhaust available administrative remedies before seeking judicial relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). An exception to this requirement arises when a litigant makes a showing of irreparable injury and the government asserts no countervailing interest in requiring exhaustion. Compare *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969), with *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). However, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Accord, *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U.S. 209, 222 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 51-52. Petitioner will suffer no harm other than

litigation expense as a result of pursuing his administrative remedies to completion.[6] The insubstantial nature of petitioner's interest in bypassing the administrative process does not outweigh the strong governmental interest in preventing piecemeal appeals and avoiding disruption of the administrative process. *McKart* v. *United States*, *supra*, 395 U.S. at 194; *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 385 (1938); *Macauley* v. *Waterman Steamship Co.*, 327 U.S. 540, 544-545 (1946). Because petitioner has not exhausted his administrative remedies, he is not entitled to injunctive relief against the Secretary or judicial review of the Secretary's regulations.[7]

2. In any event, the court of appeals correctly rejected petitioner's claim (Pet. 11-20) that the Secretary lacks power to promulgate rules providing for the termination of grading services. Contrary to petitioner's assertion (*id.* at 13), the Agricultural Marketing Act of 1946 is not "purely a research bill." The Act repeatedly and expressly refers to the Secretary's regulatory and rule-making powers. The preamble to the Act states that a major purpose of the Act is to provide for "an integrated

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[6]Meat grading services can only be withdrawn in accordance with a final administrative order (Pet. App. A-3). Both the administrative law judge and the federal district court can stay such an order pending judicial review. Petitioner will thus continue to receive grading services until he has had an opportunity to litigate his claims fully and fairly.

[7]It is sufficient to require exhaustion that there is a possibility that the agency may agree with the litigant's claim or, if disagreeing, may provide a definitive explication of its position that will facilitate judicial review. An agency's interpretation of its own organic statute is entitled to judicial deference under familiar principles of administrative law. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 10.

administration of all laws enacted by Congress to aid the distribution of agricultural products through * * * regulatory activities." 7 U.S.C. 1621. The Act empowers the Secretary to provide grading services and also directs him to prescribe rules and regulations "to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire." 7 U.S.C. 1622(h). In addition, the Act expressly authorizes the Secretary to adopt substantive rules to implement the provisions of the statute. 7 U.S.C. 1624(b). The validity of a regulation promulgated under such a provision "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

Petitioner attempts to brush aside this express statutory authority on the ground that, during the floor debates on the Agricultural Marketing Act, Senator Russell assured Senator Taft that the bill would not increase the power of the Department of Agriculture (see Pet. 11-12). From this brief interchange, petitioner concludes that the Secretary has no regulatory power at all under the Act. A more plausible explanation of Senator Russell's statement is that the Act did not extend the power of the Department because it merely consolidated preexisting regulatory functions. See 7 U.S.C. 1621. By the time Congress passed the Agricultural Marketing Act of 1946, the Secretary had been furnishing meat grading services for 20 years. See note 3, *supra*. And as the court of appeals explained (Pet. App. A-23), the Secretary has withdrawn grading services in cases of serious misconduct since 1936. See 1 Fed. Reg. 2126, 2129 (1936).

The court of appeals also correctly rejected petitioner's contention (Pet. 19) that, absent express statutory authority, agencies have no power to refuse to deal with persons whose conduct threatens the integrity of their regulatory programs. This Court's decisions establish that federal agencies have an inherent power to protect themselves in this fashion. See *L.P. Steuart and Bros.* v. *Bowles*, 322 U.S. 398, 403-407 (1943); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 121123 (1926). The courts of appeals have also recognized that agencies may decline to provide services to or do business with persons whose conduct undermines the effectiveness of their programs. *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 582 (2d Cir. 1979); *Jacquet* v. *Westerfield*, 569 F. 2d 1339, 1344-1346 (5th Cir. 1978); *Gonzalez* v. *Freeman*, 334 F. 2d 570, 576-577 (D.C. Cir. 1964) (Burger, J.).

Finally, the court of appeals correctly rejected petitioner's contention (Pet. 17-18) that the Secretary lacks power to suspend services under the Act because certain other statutes contain express suspension or penalty provisions. As the court explained (Pet. App. A-23 to A-24), the legislative history of the Agricultural Marketing Act indicates that Congress knew and approved of the Secretary's long established suspension policy. The court also noted that the statutes petitioner relies on differ from the Agricultural Marketing Act in an essential respect: they direct the Secretary to regulate various activities by issuing licenses or imposing forfeitures (Pet. App. A-20). By contrast, the Agricultural Marketing Act establishes a voluntary program. 7 U.S.C. 1622(h). The Secretary cannot require anyone to use official grading services as a condition to doing business. He cannot impose fines or penalties. He can, however, protect his program by specifying types of misconduct that frustrate the program and necessitate suspension of services. *L.P. Steuart and Bros.* v. *Bowles*, *supra*.

3. Contrary to petitioner's contention (Pet. 20-22), the Secretary has not transgressed the rule of *SEC* v. *Chenery Corp.*, 319 U.S. 80 (1943).[8] Petitioner's repeated efforts to enjoin the administrative process have thus far prevented the Secretary from compiling the sort of record upon which a discretionary decision, supported by a statement of reasons, can be rendered. Moreover, there is no merit to petitioner's argument (Pet. 22) that the Secretary promulgated his regulations solely under the authority contained in 7 U.S.C. 1622(h). Both the Secretary's notice of rulemaking and the preamble to the final regulations rely on the Agricultural Marketing Act as a whole. See 12 Fed. Reg. 7843 (1947); 13 Fed. Reg. 1275 (1948). Thus, when petitioner filed suit challenging the validity of the regulations the Secretary properly invoked and the courts below properly considered all relevant statutory provisions. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 245-248 (1964).[9]

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[8]Neither of the courts below addressed this argument because petitioner raised it for the first time in his petition for rehearing and suggestion for rehearing en banc in the court of appeals. The court of appeals denied the petition without comment.

[9]The administrative complaint does charge petitioner with violating 7 U.S.C. 1622(h) and states that proceedings will be brought pursuant to that provision and the regulations governing the withdrawal of services. However, an administrative complaint need not set forth a complete explication of the agency's regulatory powers. Petitioner's *Chenery* argument boils down to the contention that the Secretary may not fully defend this lawsuit because he did not anticipate its filing and did not provide a complete justification for his regulations in the administrative complaint. *Chenery* does not suggest such a bizarre result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1980

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No. 79-1592

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK R. WEST,
Petitioner,

VERSUS

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Eighth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July, 1980

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No. 79-1592

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK R. WEST,
Petitioner,

VERSUS

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Eighth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents' opposition to certiorari in this important case glides blithely over the very substantial questions of federal law presented here.

(1) The Secretary continually refers to what *he* has decided to do with regard to *his* assumption of power to impose severe sanctions on private citizens. But the "question of first impression" (*West* v. *Bergland*, 611 F.2d, at 716) here is whether *Congress* has authorized the Secretary to impose sweeping sanctions against private citizens under the Agricultural Marketing Act. *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961) ("The de-

terminative question is *not* what the [Secretary] thinks [he] *should* do but what Congress has said [he] *can* do") (emphasis added).

The fact that the Secretary is unable to cite any persuasive statutory language, or legislative history, to support his claims of a sweeping, discretionary sanctioning power simply reemphasizes the need for plenary review of the issues here presented by this Court. *SEC* v. *Sloan*, 436 U.S. 103, 116-121 (1978). The Secretary, in reluctant recognition of the fact that the awesome power to deprive a citizen of his means of livelihood *for the rest of his life* as a "sanction" must have *some* basis in a grant of power from Congress, cites a smattering of uncodified appropriation statutes which simply authorized funding for the agriculture inspection service.[1] (Br.p.3, n.3).

This Court has recently held that federal administrators cannot defend "inherent" agency power on the basis of *appropriation* statutes. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-192 and n.35 (1978).

In each Act cited, Congress merely appropriated funds to the Secretary and directed him to "investigate and certify to shippers . . . the class, [etc. of certain named] farm products." *E.g.*, 50 Stat. 425 (1937). There is no hint in any of these statutes of *any* power to *refuse* to do what Congress commanded be done with the funds it appropriated. *See, TVA* v. *Hill, supra*, 437 U.S. at 189 and n.35.

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[1] No question involving the *inspection* service is presented here, as the Secretary himself emphasized in the two courts below.

Insofar as these appropriation Acts are probative at all, the sequence is:

(a) the Secretary did *not* have *any* power to withdraw either inspection *or* grading services prior to 1946;

(b) Senator Russell, the sponsor of the Bill which became the Agricultural Marketing Act of 1946, *emphatically* stated on the Senate floor that the Secretary was granted *no* regulatory power by the Act, and, based upon Senator Russell's *unequivocal* assurances, the Bill passed "without objection". 92 Cong.Rec. Part 8, 79th Cong., 2d Sess., p.10,370 *et seq.;*

(c) the Secretary's arrogation to himself of the "awesome power to suspend" services, *SEC* v. *Sloan, supra,* 436 U.S. 103, 112 (1978), in his sole discretion, is an act taken in defiance of the will of Congress, and must fall. *Brannon* v. *Stark,* 342 U.S. 451 (1952); *Zuber* v. *Allen,* 396 U.S. 168 (1969).

(2) Respondents' brief itself demonstrates the necessity for review in this case. The brief is riddled with internal self-contradictions caused, no doubt, by attempting to defend an impossible position. Respondents *concede* that the Secretary "cannot impose fines *or penalties*" under any provision of the Agricultural Marketing Act. (Br.p.9, emphasis added). But the unauthorized sanctioning power here claimed by respondents is surely a "penalty". As Judge Ross stated in his concurring opinion below:

> ". . . [t]he regulations should provide that a limit be placed upon the length of time that *the penalties will be enforced* . . .". 611 F.2d, at 725-726 (emphasis added).

7 C.F.R. § 53.13(a) expressly states that it is used *only* "for misconduct". A sanction imposed only for alleged *misconduct* is a "penalty". It has been so considered from the time of Blackstone (*see*, 1 Bl. Comm. *56) to the present day. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165, 168-169 (1963).[2]

(3) Respondents assert (Br.p.7) that the Agricultural Marketing Act of 1946 is far more than "purely a research bill". To believe this is to believe that one of the most respected men ever to sit in the United States Senate, Senator Richard B. Russell, openly lied to his colleagues at length on the floor of the Senate. *See*, 92 Cong. Rec., Part 8, 79 Cong., 2nd Sess. at 10,370 *et seq.* (July 29, 1946). The notion is absurd. Equally absurd is the notion that such a pure research bill can give great and grave power to an administrator to impose severe sanctions upon a private citizen *in addition* to the criminal sanctions imposed by Congress. This Court has consistently rejected assertions of administrators claiming the power to create sanctions which may be imposed upon a private citizen *in addition to* those which Congress has enacted. *Campbell* v. *Galeno Chemical Company*, 281 U.S. 599, 609-610 (1930) (Brandeis, J.); *United States* v. *Weitzel*, 246 U.S. 533, 542 (1925). This Court has been required to remind the Secretary of Agriculture that such fundamental legislative power is granted only to Congress, not to him. *E.g.*, *Wallace* v. *Cutten*, 298 U.S. 229, 237 (1936) (Brandeis, J.). *See also*, *SEC* v. *Sloan*, *supra*, 436 U.S. 103, 115-121 (1978).

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[2] Indeed, *all* of the criteria identified by the Court in *Mendoza-Martinez* (372 U.S. at 168-169) as marking the indicia of a penal or quasi-penal sanction are clearly met by the very terms of 7 C.F.R. §53.13(a).

(4) Respondents argue a case which the facts simply do not present. Respondents suggest that agencies have "inherent power" to "refuse to deal with [various] persons. . . ." (Br.p.9).

Apart from the audaciousness of the assumption of "inherent power" to *sanction* a citizen, the underlying premise is hopelessly flawed and, of itself, shows the need for review here. Petitioner has *never* contended that respondents are legally required to "deal with" him. If, for example, the Secretary proposed to debar petitioner from participating in contractual awards of the Department of Agriculture, he could, consistent with procedures agreeable to due process, do so. In that situation, the cases cited by respondents, *Gonzalez,* v. *Freeman,* 334 F.2d 570, 576 (D.C. Cir. 1964) (Burger, J.) and *L. P. Stuart & Bros.* v. *Bowles,* 322 U.S. 398 (1943) might be relevant.[3]

But *that* is *not* this case.

In *this* case, petitioner seeks certiorari in order to resolve the question of whether a naked claim of "inherent power" by an administrator can be used to prevent a private citizen from doing business with another private citizen in a transaction to which the Secretary is *not* a

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[3] *L. P. Stuart & Bros.* was, however, a unique case involving a very broad grant of *wartime* rationing powers to the President himself. It was decided against the backdrop of the urgent national emergency generated by the Second World War. Mr. Justice Douglas was careful to confine the decision to its precise facts (322 U.S. at 403) and it has never been applied by this Court in *any* subsequent case. *See, Social Security Board* v. *Nierotko,* 327 U.S. 358, 369, n.23 (1946). Whether it is a viable precedent in a case such as this is dubious, but the mere fact the Secretary believes it is, shows the necessity for plenary review here.

party. Neither *L.P. Stuart & Bros., supra, Gonzalez* v. *Freeman, supra,* nor any other decision of *any* federal court supports such a sweeping claim of "inherent power" to *sanction* under these circumstances. *See, SEC* v. *Sloan, supra.* The question of whether such awesome power can be created by the incantation "inherent power", in the face of unequivocal statements of the sponsor of the Bill which became the statute under which the "inherent power" is claimed that it was "strictly a research bill", 92 Cong.Rec. Part 8, 79th Cong., 2d Sess. at 10,370 *et seq.* (July 29, 1946) (Sen. Russell) is "a question of first impression [which] is not easily rejected." (611 F.2d, at 715). The question should receive plenary review from this Court.

(5) Respondents observe that the sanctioning regulation has been in effect for a considerable time without a judicial challenge to its validity. That, of course, is wholly irrelevant to the question of whether the regulation is void. In *SEC* v. *Sloan, supra,* the SEC's suspension practice had been in use without challenge since 1944 (436 U.S., at 117), two years prior to the time the Agricultural Marketing Act was enacted. The long-continued administrative practice did not impress this Court, which unanimously held the SEC's suspension practice void. The same result should follow here.[4]

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[4] Respondents cite 1 Fed.Reg. 2126, 2129 (1936) as the first such regulation. No such regulation appears on the pages cited. 1 Fed. Reg. 2452-2455 (Dec. 10, 1936) is, presumably, what is intended. Yet the regulations there purport to be issued, in part, pursuant to an appropriation act for the Farm *Credit* Administration. Such grasping at straws for statutory authority merely emphasizes the infirmity of respondents' position.

(6) In our petition for certiorari, we demonstrated that, at the very least, this case must be remanded because the Secretary's appellate counsel sought to defend the regulation here at issue by virtue of a provision of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1624(b), which is nowhere referenced in the administrative "complaint" filed against petitioner. *SEC* v. *Cherney Corporation*, 319 U.S. 80 (1943), and its progeny. Since we find respondents' argument on this point utterly incomprehensible, we do not lengthen this memorandum by responding to it. The simple fact is that the *post hoc* rationalization employed by the Secretary's appellate counsel, and accepted by the Court of Appeals, is so blatant a violation of the *Cherney* rule as not to need further discussion. Reversal and remand are, thus, the least that is required here.

(7) Respondents now suggest (Br.pp.1, 6, 7) that this case presents a question as to "exhaustion" of some supposed "administrative remedies" prior to judicial review. No such issue is presented. The Court of Appeals below unanimously held that petitioner need not exhaust any supposed "administrative remedies" because, assuming such a "remedy" existed, "exhaustion" would be a vain, useless, futile act with a foregone conclusion and without *"any* compensating clarification of the issue" since, *inter alia,* the only issue was one of law. *West* v. *Bergland*, 611 F.2d 710, 714-720 (8th Cir. 1979). Respondents filed no cross-petition for certiorari seeking review of the unfavorable holding. Since "these questions were decided adversely to respondents by the Court of Appeals and no cross-petition was filed here, . . . these questions are therefore not open to respondents at this stage." *Alaska Industrial*

Board v. *Chugach Electric Association*, 356 U.S. 320, 325 (1958); *accord, e.g., Strunk* v. *United States*, 412 U.S. 434, 437 (1973) ("in the absence of a cross-petition for certiorari, questioning the holding [with which the government disagrees], the only question properly before us is the [question presented by the petition for certiorari]"; *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972) (while respondent disagrees with one aspect of the holding of the Court of Appeals, "since no timely cross-petition for certiorari was filed by the respondent, this question is not before us").[5]

In any event, for the reasons discussed at length by the Court of Appeals (611 F.2d, at 714-720) there is no merit in the suggestion that "exhaustion" is required in this case. The question for decision is whether the very regulation under which respondents seek to impose sanctions is unauthorized by the statute, and, thus, void. *Leedom* v. *Kyne*, 358 U.S. 184, 189 (1958); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1954); *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U.S. 456, 469 (1943). Where, as here, only a pure question of law is presented, there must be a compelling reason to require "exhaustion". There is none here. *See, Ostereich* v. *Selective Service System*, 393 U.S. 233, 242 (1969) (Harlan, J., concurring); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153-155 (1967); *Touche Ross & Co.* v. *SEC*, 609

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[5] Respondents state (Br.p.5 n.5) that the district court required petitioner to exhaust "administrative remedies". This is incorrect. The court of appeals clearly held that the district court had only required exhaustion of administrative remedies on the *remaining* questions, *i.e.*, the questions *other than* the question of whether 7 C.F.R. §53.13(a) was authorized by statute. *West* v. *Bergland*, 611 F.2d 710, 714 n.6.

F.2d 570, 572-577 (2d Cir. 1979). As the Court of Appeals below correctly stated, the question presented here is a pure question of law: "whether the regulation is authorized by the statute." *West* v. *Bergland*, 611 F.2d, at 715. This question is ripe for decision on the merits.[6]

The "exhaustion" argument, thus, is not properly before the Court and, in any event, is without merit.

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[6] Respondents' citation of such cases as *Myers* v. *Bethlehem Ship Building Corporation*, 303 U.S. 41 (1938), in which this Court held that a district court should not exercise its equitable powers to usurp the statutorily exclusive *fact-finding* function of the National Labor Relations Board, where the facts upon which resolution of the case depended were in vigorous dispute, is inexplicable. In this case, as the court below correctly stated, there is *no* factual issue in dispute which is "germane" to the questions presented by the instant petition for certiorari. (*West* v. *Bergland*, *supra*, 611 F.2d, at 715 n.7). Similarly, the citation to other "exclusive forum" cases such as *Yakus* v. *United States*, 321 U.S. 414 (1944), simply makes no sense in the present context. Congress has not here established a specialized trial court, or other fact-finding tribunal and expressly given that tribunal exclusive authority to determine all legal disputes which may arise under the agricultural laws of the United States. *Compare*, *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). Absent such a statute, the "exhaustion" argument, when applied to pure questions of law such as are now before this Court, ceases to be a reasoned process and becomes a useless ritual to which a citizen is not to be needlessly subjected. *E.g.*, *McKart* v. *United States*, 395 U.S. 185 (1970); *Finnerty* v. *Cowen*, 508 F.2d 979, 982-83 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1980

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this ___ day of July, 1980, mailed three true and correct copies of this Reply Memorandum to the Honorable Wade H. McCree, Jr., Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, and to further certify that all parties required to be served have been served, to-wit, Alice Daniel, Assistant Attorney General, Department of Justice, Washington, D.C. 20530.

BERNARD J. ROTHBAUM, JR.